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CURRENT EVENTS.

WIFE BEATING—CORPORAL PUNISHMENT—ECONOMY.—We took occasion in a former number of this JOURNAL[1] to comment on the primeval practice of corporal punishment, which we believe lingers only in the State of Delaware. It was suggested that there should be a return to the ancient institution of the whipping post for the punishment of certain nefarious criminals, notably the miscreants who beat their wives.

We opposed the proposal, because we think that such a punishment so long disused and so degrading, although richly deserved by the culprit, would reflect unmerited disgrace upon his injured wife and innocent children. John Tobin, the dramatist, says:

> "The man that lays his hand upon a woman
> Save in the way of kindness, is a wretch
> Whom 'twere gross flattery to name a coward."

The legislature of New Mexico has improved upon this *dictum* by adding, in effect, that such a creature is also a felon. It has enacted that an assault by a husband upon his wife shall be a felony, punishable by imprisonment in the penitentiary for a term of not less than one, nor more than five years. This line of legislation is liable to serious criticism. The punishment is scarcely, if at all, less disgraceful than that of the whipping post; it is long continued, and for years the family of the convict is deprived of the aid, such as it may be, which his labor may add to its support. No doubt in many cases the room of the delinquent is better than his company, and his enforced absence in the service of the State, howsoever protracted, is a relief and a blessing; but in many other cases the family is so poor, helpless and dependent, that even so broken a reed as a brutal or drunken husband and father is better than no staff at all.

The subject is not only painful but difficult. To treat wife beating as assault and battery of an aggravated character is inefficient unless the imprisonment is protracted, and in that case the objection we have already indicated to the New Mexico plan is fully applicable; the whipping post and the penitentiary are *too* disgraceful, and the question remains, what is the best mode of punishing men who beat their wives?

We think that for the punishment of all offenses of this character, where the wife or any member of the family of the culprit is the victim of the crime, there should be work-houses provided, in which the offenders should be kept at hard labor and *all* proceeds of their toil be devoted to the maintenance of their families, thus by the strong hand of the law, compelling them to perform their duty. The system should be as free as possible from the external *indicia* of disgrace, a distinctive prison garb should be dispensed with, shackles should be resorted to only in case of the direst necessity, and no punishments of a degrading character inflicted in the prison. As far as possible, which, however, it is to be feared is not very far, the disgrace of the punishment should be averted from the innocent sufferers, and courts would be free to inflict condign punishment upon the guilty, being relieved of any compunctious visitings of conscience, lest the innocent would also suffer by their action.

The chief objection that could be made to this system is specious, and apparently conclusive. It is that such a method of punishment is too expensive, and would add greatly to the burdens of a people already, as politicians sometimes say, "groaning under the weight of taxation." It is liable to the further objection that it would introduce a species of favoritism, giving one class of convicts an undue advantage over another; and still further that it is not the function of a government to give away the people's money in charity, that the earnings of the convict belong to the State, are public money, and cannot be thus disposed of without gross injustice to the people, that supporting a family, even out of the labor of a convict husband and father, is giving away the money of the people.

In answer to this line of reasoning it may be said that the punishment of crime is one of the primary duties of a government, that it is incumbent upon the State to defray the expenses out of the money of the people; and that the earnings of convicts under

[1] 26 Cent. L. J., 169.

punishment are not in any proper sense the money of the people, but constitute a secondary and subsidiary fund, which the legislature may, if in its opinion policy require it, dispense with altogether. We see no reason why a legislature may not abolish the whole system of convict labor and return to the system of punishment by solitary confinement, which in the early years of this century was for a season quite a favorite mode of punishment. In other words, the people have no vested right to the earnings of convicts which is not subject to the control of the legislature, if that body should deem it good policy to change the system under which those earnings accrue, either altogether or in part.

As we intimated in a former article, there seems to be a strong impression prevalent in many portions of the country that the earnings of convicts are in a certain degree a sacred fund which no legislature can justly or safely infringe upon or diminish; that the convict should be made, at all events and at all hazards, to pay his way by his labor from conviction to liberation, and that any public officer who in any manner contravenes this principle is recreant to the responsibilities with which he has been intrusted. As we have already said, we consider this an erroneous opinion, the punishment of offenders at the sole expense of the nation is the primary duty of the State, the diminution of the expense of that punishment is a secondary consideration. If it can be done by exacting from convicts all the labor of which they are capable, the State is barely entitled to the benefit of the diminution, but the legislature in its discretion may well make exceptions from the operation of this rule of such classes of offenses as justice and public policy seem to require. And the class of cases to which this latter view is most applicable is that of convicts who beat their wives, whose labor primarily belongs to their families, so far as it may be necessary for their support, and which in no point of view can be regarded as the property of the State.

NOTES OF RECENT DECISIONS.

INSURANCE—ACCIDENT INSURANCE—SUICIDE PRESUMPTION—MURDER.—The Supreme Court of the United States recently decided a case,[1] in which was involved the question whether, under its peculiar circumstances, the death of a party insured would be presumed to have occurred from suicide, accident, murder or other means. The facts of the case were that the party insured was found dead in his office with a pistol shot through his heart. Mr. Justice Harlan, in delivering the opinion of the court, said:

"There is no escape from the conclusion that, under the issue presented by the general denial in the answer, it was incumbent upon the plaintiff to show, from all the evidence, that the death of the insured was the result, not only of external and violent, but of accidental means. The policy provides that the insurance shall not extend to any case of death or personal injury, unless the claimant under the policy establishes, by direct and positive proof, that such death or personal injury was caused by external violence and accidental means. Such being the contract, the court must give effect to its provisions according to the fair meaning of the words used; leaning, however, where the words do not clearly indicate the intention of the parties, to that interpretation which is most favorable to the insured.[2] The requirement, however, of direct and positive proof, as to certain matters, did not make it necessary to establish the fact and attendant circumstances of death by persons who were actually present when the insured received the injuries which caused his death. The two principal facts to be established, were external violence and accidental means, producing death. The first was established when it appeared that death ensued from a pistol shot through the heart of the insured. The evidence on that point was direct and positive; as much so, within the meaning of the policy, as if it had come from one who saw the pistol fired; and the proof, on this point, is none the less direct and positive because supplemented or strengthened by evidence of a circumstantial character. Were the means by which the insured came to his death also accidental? If he committed suicide, then

[1] Travellers' Ins. Co. v. McConkey, U. S. S. C., May 14, 1888; 8 S. C. Rep. 1360.

[2] Bank v. Insurance Co., 95 U. S. 678; Insurance Co. v. Cropper, 32 Pa. St. 355; Reynolds v. Insurance Co., 47 N. Y. 604; Anderson v. Fitzgerald, 4 H. L. Cas. 484, 498, 507; Fowkes v. Association, 3 Best & S. 925.

the law was for the company, because the policy, by its terms, did not extend to or cover self-destruction, whether the insured was at the time sane or insane. In respect to the issue as to suicide, the court instructed the jury that self-destruction was not to be presumed. In Mallory v. Insurance Co.,[3] which was a suit upon an accident policy, it appeared that the death was caused either by accidental injury or by suicidal act of the deceased. 'But,' the court properly said, "the presumption is against the latter. It is contrary to the general conduct of mankind; it shows gross moral turpitude in a sane person.' Did the court err in saying to the jury that, upon the issue as to suicide, the law was for the plaintiff, unless that presumption was overcome by competent evidence? This question must be answered in the negative. The condition that direct and positive proof must be made of death having been caused by external, violent, and accidental means, did not deprive the plaintiff when making such proof, of the benefit of the rules of law established for the guidance of courts and juries in the investigation and determination of facts. Upon like grounds, we sustain the ruling to the effect that the jury should not presume, from the mere fact of death, that the insured was murdered. The facts were all before the jury as to the movements of the insured on the evening of his death, and as to the condition of his body and clothes when he was found dead, at a late hour of the night, upon the floor of his office. While it was not to be presumed, as a matter of law, that the deceased took his own life, or that he was murdered, the jury were at liberty to draw such inferences in respect to the cause of death as, under the settled rules of evidence, the facts and circumstances justified. We are, however, of opinion that the instructions to the jury were radically wrong in one particular. The policy expressly provides that no claim shall be made under it where the death of the insured was caused by 'intentional injuries inflicted by the insured or any other person.' If he was murdered, then his death was caused by intentional injuries inflicted by another person. Nevertheless, the instructions to the jury were so worded as to convey the idea that, if the insured was murdered, the plaintiff was entitled to recover; in other words, even if death was caused wholly by intentional injuries inflicted upon the insured by another person, the means used were 'accidental' as to him, and therefore the company was liable. This was error. Upon the whole case the court is of the opinion that, by the terms of the contract, the burden of proof was upon the plaintiff, under the limitations we have stated, to show, from all the evidence, that the death of the insured was caused by external violence and accidental means; also that no valid claim can be made under the policy if the insured, either intentionally or when insane, inflicted upon himself the injuries which caused his death, or if his death was caused by intentional injuries inflicted upon him by some other person. The judgment is accordingly reversed, and the cause remanded, with directions to grant a new trial, and for further proceedings consistent with this opinion."

[3] 47 N. Y. 54.

BONA FIDE HOLDER OF NEGOTIABLE PAPER — NOTICE FROM THE FACE OF THE INSTRUMENT, ETC.

1. Introductory.
2. Requisites to Constitute a Bona Fide Purchaser.
   - *A.* Must be Negotiable Paper.
   - *B.* Must be before the Instrument is Due.
   - *C.* Must be in Usual Course of Business.
   - *D.* Must be for a Valuable Consideration.
   - *E.* Must be without Notice—In Good Faith, etc.
     - *a.* Constructive Notice Derived from the Instrument Itself.
     - *b.* Question of Construction for the Court.
     - *c.* Instances of Notice from the Face of the Instrument.
     - *d.* Degree of Care Required.

1. Introductory.—It is a principle of law, settled beyond contradiction, that whoever purchases negotiable paper, before it is due, in the usual course of business, and for a valuable consideration, *without notice of the existence* of any equities between the maker and the payee, will hold the same free from any defenses or claims the maker may have against the payee.

2. Requisites to Constitute a Bona Fide Purchaser.—It will be seen from the above statement then, that in order to clothe the

purchaser of negotiable notes or drafts with an unimpeachable title, five prerequisites must exist.

A. Must be Negotiable Paper.—First, the paper must be what is known in law as negotiable paper. This is ordinarily said to be a simple promissory note, made payable to A B "or bearer," "or order," "or assigns." Were the parties always satisfied with this simple designation in the ordinary promissory note, and not encumber it with some outside matter, the question as to whether a certain instrument was negotiable or not, would be one of very easy solution, but such is not the case, hence the trouble. It has been decided that a stipulation for collection expenses would destroy its negotiability,[1] as would the attachment of a seal,[2] or the uncertainty of the amount.[3] The question whether or not a stipulation for the payment of attorney fees will destroy the negotiability of an otherwise negotiable instrument, is a very much mooted question, there appearing in this journal no less than three leading articles,[4] a prominent notice on current topics,[5] and numerous other cases.[6] There is also an article on a kindred subject by a very able contributor.[7]

B. Must be before the Instrument is Due.—Seeondly, the purchase must be made before the note is due. The instrument usually shows the fact, and it is one which is generally easy of solution. In this connection, however, it is well to remember that a purchase made on the last day of grace will be held to have been made before the instrument was due.[8] It has also been held that a bill of exchange was not past due until after it had been presented for payment.[9] Likewise, where a note is due on demand, or one day after date, it is not past due until a reasonable time has elapsed after its date.[10]

C. Must be in Usual Course of Business.—Third, the purchase must be made in the "usual course of business." If it has been made out of the usual course of business and under circumstances sufficient to impart notice of defects, it will not be a purchase free from the existing equities.[11] The paper must be actually delivered to the purchaser, as mere promise to deliver it in the future will not do.[12] Not only delivery, but indorsement is necessary to constitute the holder a purchaser in the ordinary course of business,[13] unless the paper is payable to bearer;[14] and where the note is held by a bank or other corporation the indorsement must be made by the duly authorized officer.[15] And it will not be due course of business if the note is delivered before and indorsed after maturity,[16] or transferred before and indorsed after maturity.[17] A purchaser of a note after its maturity, under an execution against a collecting agent, will not be in the ordinary and due course of business.[18]

D. Must be for a Valuable Consideration.—Fourth, a valuable consideration must be paid for the note. The inadequacy of the consideration is immaterial, except as evidence of bad faith.[19] By the "usual course of trade" is meant a transfer according to the usages and customs of commercial transactions,[20] and the purchase of negotiable paper by a bank at its counter for cash is receiving the paper in the usual course of trade, whether its *fair* or *reasonable* value was paid or not.[21] Gross inadequacy is admissible in order to show bad faith in the purchaser.[22] And it is said by leading au-

[1] Morgan v. Edwards, 14 Cent. L. J. 33.
[2] Brown v. Jordhal, 19 N. W. Rep. 650.
[3] Miller v. Page, 15 Cent. L. J., 137, dig.; Smith v. Marland, 15 Cent. L. J., 437, dig.
[4] E. Vanlise in Vol. 14, 286; E. G. Taylor in Vol. 14, 86; J. N. Payne in Vol. 17, 282.
[5] Vol. 12, 337; Vol. 16, 241.
[6] Maryland v. Newman, 18 Md. 19; First National Bank v. Laiser, 18 Wis. 399; Trader v. Chidester, 19 Wis. 318; Janes v. Radolz, 11 Wis. 512.
[7] "Stipulation to Pay Exchange Fees," etc., by Adelbert Hamilton, Vol. 17, 146.
[8] 2 Am. & Eng. Ency. of Law, 398; Continental Nat. Bank v. Townsend, 87 N. Y. 8.
[9] 2 Randolph on Commercial Paper, 701; Swan's Treatise, 725-733.
[10] Parker v. Stalling, 1 Philips, 590.
[11] Moore v. Moore, 39 Iowa, 466.
[12] Russell v. Scudder, 42 Barb. 31.
[13] Sturges v. Miller, 80 Ill. 241; Allum v. Perry, 68 Maine, 232; Boody v. Bartlett, 42 N. H. 555; Gibsom v. Miller 29 Mich. 355; Losee v. Bissell, 76 Penn. St. 459.
[14] Norton v. Pickens, 21 La. Ann. 575.
[15] Smith v. Lawson, 18 W. Va. 212.
[16] Lancaster v. Taylor, 100 Mass. 18.
[17] Southard v. Porter, 43 N. H. 379.
[18] McCormack v. Williams, 54 Iowa, 50.
[19] Tod v. Wick, 36 Ohio St. 370; Cromwell v. County of Sac, 96 U. S. 60; 2 Parsons N. and B, 428; 1 Daniel on Neg. Inst., § 777.
[20] 1 Daniel on Neg. Inst., § 780.
[21] Tod v. Wick, 36 Ohio St. 392.
[22] 1 Dan. on Neg. Inst., § 628; 1 Edwards, § 452; Story on Prom. 197; 2 Randolph on Com., § 992.

thors that gross inadequacy of consideration amounts to implied notice of the existing defenses.[23] The taking of a bill or note as collateral amounts to a purchase of it in the ordinary course of business.[24] It is now settled by the vast majority of the decisions, although it was formerly a question of much division, that the payment of an existing debt is sufficient consideration to constitute a *bona fide* holder for value.[25]

E. Must be without Notice—In Good Faith, etc.—Fifth. The purchase must be made in *good faith*, that it must be made with an honest and just purpose and without an intention to wrong the maker. It must be made without *notice*[26] of any equities existing between the original parties. This notice may be actual, as when some one informs the purchaser of the existing defenses, or it may be constructive, as when the circumstances surrounding the transaction are such that the law will presume that the party knew of the existing defenses.

Constructive notice, in reference to a bona fide purchaser of negotiable paper, may be derived from two sources, either from the instrument itself, as where it shows on its face that it is dishonored, or from other surrounding circumstances, as where a note is offered for sale at an unusual discount, etc.

a. Constructive Notice Derived from the Instrument Itself.—A person who takes a bill which, on the face of it, was dishonored, cannot be allowsd to claim the privileges which belong to a *bona fide* holder. If he choses to receive it under such circumstances, he takes it with all the infirmities belonging to it, and is in no better condition than the person from whom he received it.[27]

b. Question of Construction for the Court.—Where the supposed defect or infirmity in the title of the instrument appears on its face at the time of the transfer, the question whether a party who took it had notice or not, is, in general, a question of construction, and must be determined by the court as a matter of law.[28] Here it should be observed there is a wide distinction between where the notice is had from the instrument itself and where it is from the attending and surrounding circumstances. The first is a question for the court, the latter for the jury.

c. Instances of Notice from the Face of the Instrument.—In Fowler v. Brantley[29] it was held that if a bill or note has the marks of a bank upon it showing that it has been offered for discount at a bank and refused, that this will amount to a notice to the purchaser, and he will not be *bona fide*. In this case an ordinary note was presented to a bank for discount and was refused, and the figures 165 were written in pencil on the note. This was known among banks as a customary sign of dishonor. It was then taken by another bank to whom it was sold, and the court held that it was not a *bona fide* holder. The court says: "So the paper before us carried on its face circumstances of suspicion so palpable as to put those dealing for it before maturity on their guard; and in whose hands strict inquiry into the title of those through whose hands it had passed. Failing to be thus diligent, they must abide by the misfortune their negligence imposed."

In the case of Andrews v. Pond[30] a bill of exchange was protested for non-acceptance, and this appeared on the face of the instrument and the purchaser was held not to be *bona fide*. And it has been held that where interest is overdue on the paper, as in the case of annual interest nearly a year in ar-

[23] 1 Dan. on Neg. Inst., § 726; 1 Edwards on Bills and Notes, § 452; Randolph on Com. Paper, § 992. See article in Vol. 22, Cent. L. J. 437, on "Bona Fide Holder of Negotiable Paper—What is Bad Faith," in which the subject is discussed.

[24] Gardner v. Gager, 1 Allen, 502.

[25] Draper v. Cowles, 27 Kan. 484; Dixon v. Dixon, 31 Vt. 450; Wood v. Sutzinger, 14 Phil. 430; Swift v. Tyson, 16 Pet. 1; Riley v. Anderson, 2 McLean, 589; Lanning v. Lockett, 10 Fed. Rep. 451; Currie v. Misa, L. R. 10 Ex. 153; Gould v. Segee, 5 Duer, 260; Homes v. Smith, 16 Mo. 177; Knox v. Clifford, 38 Wis. 651; Hodges v. Black, 76 Mo. 537; Reddick v. Jones, 6 Ired. (N. S.) 107; Russell v. Haddock, 8 Ill. 233; Stevenson v. Heyland, 11 Minn. 198.

[26] The word "notice" means knowledge. Goodman v. Simonds. 20 How. 343.

[27] C. J. Taney in Andrews v. Pond, 13 Pet. 65; Fowler v. Brantley, 14 Pet. 318; Sandford v. Norton, 14 Vt. 228; McConnel v. Hodson, 2 Gilm. 233; Matthews v. Pogthess, 4 Ga. 287; McKeeson v. Stanberry, 3 Ohio St. 56.

[28] Goodman v. Simonds, 20 How. 343; Andrews v. Pond, 13 Pet. 65; Fowler v. Brantley, 14 Pet. 318; Bross v. Davis, 3 T. R. 70: Ayer v. Hutchins, 4 Mass. 370; Merchants' Nat. Bank v. Hanson, 33 Minn. S. C., 53 Am. R. 5.

[29] 14 Pet. 319.

[30] 13 Pet. 79.

rears, it will constitute notice of defenses to the purchaser.[31]

In Harroll v. Broxon[32] it was held that if one takes a note after it is due, the fact that it has not been paid when due is evidence of its dishonor, and if there are several notes so purchased which are due at different times, but constitute one transaction, the fact that one note is due and unpaid, puts the purchaser upon inquiry as to the others and charges him with all the equities between the original parties.

If a note is indorsed "for my use," it will be notice to the purchaser of defenses on the part of such indorser.[33] So where a note, held merely as collateral, has a memorandum on it that "the note is held by me for the note of A B."[34] Likewise, if a note is drawn expressly "for the benefit of A B,"[35] or where it is indorsed in trust for another.[36] Also where a note has written across its face "to be held as collateral," the purchaser takes subject to the equities between the original parties.[37] In this case the court says: "But was there nothing on the face of this paper to excite inquiry of a prudent man? The face of the paper disclosed the pregnant fact, presumed to have been placed there when executed: 'To be held as collateral.' There were but two contracting parties to the paper when plaintiff purchased it—B and the defendants. The plaintiff purchased from B with a knowledge that he held it and was to continue to hold it as collateral; that there was an indebtedness between B and the defendants, and this note was given and received as collateral for the debt. The plaintiff received it with that notice. 'Any circumstance which would place a prudent man on his guard in the purchase of negotiable paper, shall be sufficient to constitute notice to a purchaser of such paper before it is due.'[38] If these plaintiffs had notice that this paper was to be held as collateral, was it not their duty to inquire, and failing to do so, can they be said to be innocent holders? We think not, but they hold sucject to all the defenses and equities existing between B and the defendants."

The purchaser will not be affected by the fact that the paper is indorsed without recourse,[39] or even by the fact of a special indorsement without recourse, stating that the indorser had no knowledge as to the original consideration of the note.[40] Likewise, an indorsement of a waiver of protest, coupled with a statement that the maker is good, will not affect the purchase.[41] But if the indorsement shows that it is restrictive and that it is merely intended to be held as collateral security, the purchaser will be put upon inquiry.[42] Where paper is held as a trustee and this appears upon its face, it is sufficient to put the purchaser upon inquiry.[43]

In Langdon v. Baxter National Bank[44] it was held that where the guardian of L., an insane person, pledged negotiable bonds belonging to his ward as collateral security for his own debt, representing that they were his own, and the bonds, with an assignment from a former owner to L. that the transferee was put upon inquiry and subject to equities. In the opinion the court says: "When a purchaser is put upon inquiry his inquiry must be made in a direction likely to lead to knowledge of the facts. If a thief should offer paper for sale which disclosed grounds for inquiry to a purchaser, inquiry of the thief alone would not satisfy the ruler No more can the rule be thus satisfied because the seller was an honest man. Here the direction the inquiry should take was plainly indicated by the paper offered for sale, and inquiry followed up in that direction would have resulted in knowledge of the true owner."[45]

In Strong v. Strauss,[46] where notes were mdade payable A B, guardian of C D, it was held that one who buys such notes, bearing on their face the marks of a trust fund, is put upon inquiry. "We cannot resist the

[31] Hart v. Stickney, 41 Wis. 630. But see Kelly v. Whitney, 45 Wis. 110, overruling this case.
[32] 3 S. E. Rep. 5 (Ga. Sup. Ct., 1887.)
[33] Treuttel v. Barendon, 7 Taunt. 100; Sigourney v. Lloyd, 8 B. & S. 622.
[34] National Security Bank v. McDonald, 127 Mass. 182.
[35] Canillo v. McPhillips, 55 Cal. 130.
[36] Payne v. Eden, 3 Cain, 213.
[37] Gibson v. Hanxins, 69 G. 354; s. c. 47 Am. R. 757.
[38] Code, § 2790.
[39] Epler v. Funk, 8 Penn. St. 468; Kelley v. Whitney, 45 Wis. 110; Stevenson v. O'Neal, 71 Ill. 314.
[40] Russell v. Ball, 2 Johns. 50.
[41] Fox v. Bank, 30 Kan. 441.
[42] Haskell v. Brown, 65 Ill. 29; Pier v. Bullis, 48 Wis. 429.
[43] Shaw v. Spencer, 100 Mass. 382.
[44] 57 Vt.; s. c., 52 Am. R. 113.
[45] See Nicholson v. Chapman, 1 La. Ann. 222.
[46] 40 Ohio St. 94.

conclusion," says Judge Dickman, "that the defendant, at the time he bought the notes, had sufficicient warning to put him upon a thorough inquiry. Thus put upon inquiry, he might easily have removed all doubt and fortified himsels by declining to purchase the notes unless the guardian would first obtain leave to sell the same, by application to the probate court."

Where the paper contains peculiar words or marks it may be sufficient to put the purchaser upon inquiry to constitute notice of existing defenses, as when a negotiable bond is marked "consolidated" and reciting a collateral mortgage,[47] or when a check is marked "mem." and indorsed several years after its date, or when it appears on the face of the note that it was given for usury,[48] or if the name of a surety is erased.[49] But the fact that an indorsement is struck out[50] or erased is not sufficient to put the purchaser on inquiry.[52] A sealed note, however, with the name of the payee blank and with a consideration specified, originally negotiated for a different consideration, carries notice on its face.[53] A memorandum on the face of a note will not, in general, be notice of anything not directly and naturally implied in its terms.[54] Thus the words "F. & L. bonds as collateral" on the face of a note will not amount to a notice of an agreement between principal and surety for a deposit of such collateral.[55] The fact that a note has been torn in two and pasted together, will not prevent a person from becoming a *bona fide* purchaser,[56] nor will the fact that the note was given for a reaping machine and contained a stipulation that the machine should not become the property of the buyer until the note was paid, prevent the purchaser from being *bona fide*.[57]

In Howry v. Eppinger[58] it was held that the words "secured by mortgage," written upon a promissory note, form no part of the note, and do not operate to limit or impair its value; nor are they sufficient to notify third parties of the contents of the mortgage or that it contained a clause inconsistent with the note, or to put them on inquiry. And where a note purporting to be secured by mortgage has been indorsed in blank by the the payee to put in the hands of an agent to dispose of, the purchaser having notice of the contents of the mortgage, which showed that the mortgagee was a different person from the payee of the note, or the seller would not be bound thereby to surmise that such seller had obtained the note wrongfully and had no authority to part with it, nor would such notice be sufficient to put him on inquiry. It is not the duty of parties about to purchase negotiable paper to make inquiries not required by good faith as to possible defenses of which they have no notice, either from anything appearing on the face of the paper or from facts communicated to them at the time."

The indorsement of a negotiable promissory note, making it payable simply to the the order of A, who has no personal interest in the transaction, the indorsement being really made for the benefit of B, is not a transfer to B so as to exclude defenses by the maker as against the payee.[59]

In Newhoff v. O'Reilly[60] it was held that a purchaser for value, etc., of a negotiable instrument, indorsed in blank by the payee, acquires a good title, though the maker was deceased and the seller was her administrator, no notice of these facts being shown.

A purchaser of negotiable paper from a *bona fide* holder for value acquires as good a title as the innocent holder had, and may recover thereon, although he may have had notice of infirmities in the note when he took it.[61]

d. Degree of Care Required.—Another distinction between notice as derived from the instrument itself and as found from outside circumstances, should be borne in mind. If the instrument bears marks of dishonor, then the purchaser is bound to make inquiry, to act with the care and caution of a prudent

[47] Caylus v. N. Y. etc. R. R., 10 Hun, 295.
[48] Skillman v. Titus, 3 Vvoom, 396.
[49] Hamil v. Mason, 51 Ill. 488.
[50] McCramer v. Thompson, 21 Iowa, 244.
[51] Colston v. Arnot, 57 N. Y. 253.
[52] Crosby v. Grant, 36 N. H. 273.
[53] Jewett v. Tucker, Mass. Sup. Ct., 1885; Mills v. Williams, 16 S. C. 593.
[54] 2 Randolph on Com. Paper, § 1013.
[55] Fitchburg Savings Bank v. Rice, 124 Mass. 72.
[56] Ingham v. Primrose, 7 C. B. 82.
[57] Heard v. Dubuque, etc., 8 Nev. 10.
[58] 34 Mich. 29.
[59] Elias v. Finnegan (Minn.), 33 N. W. Rep. 330.
[60] Mo., 1888, 6 S. W. Rep. 78.
[61] Bodley v. Emporia, etc. (Kan.), 16 Pac. Rep. 88; Butterfield v. Town, 32 Fed. Rep. 891.

man, to ascertain what is the purport and significance of such marks. If he is negligent in making proper inquiry, and as the marks would suggest to a careful and prudent man, then he cannot be said to be a *bona fide* holder. He must exercise due diligence and use all honest endeavors to inform himself as to the defenses that may be suggested by the instrument to exist between the parties. Here he is held responsible for slight negligence.[62] Not so, however, where the notice is from the surrounding circumstances. Here he will be held to be a *bona fide* holder, even though gross negligence exists, unless it is such as will amount to bad faith on his part.[63] Here he may be a *bona fide* holder, although, by caution and vigilance, he might have ascertained the existing defenses.[64] He is not even bound by circumstances that would put a prudent man on inquiry.[65] If, however, the purchaser suspects fraud, and wilfully or fraudulently fails to make inquiry, from a belief that such inquiry would result in finding that the bill or note was invalid, he will not be a *bona fide* holder, but he will take the instrument with notice of such defect.[66]

The purpose of this article was more particularly to treat of the law as to the notice presumed from the defects in the instrument itself than otherwise, and to supplement two articles by the writer in former volumes of the CENTRAL LAW JOURNAL[67] and to which reference is made for further discussion of the law in relation to *bona fide* holders of negotiable paper.

WM. M. ROCKEL.

[62] 1 Daniel, 724; 1 Edwards, § 449; 2 Randolph, 693.

[63] Chitt. 293; 1 Edwards, § 517; 1 Daniel, 721; 1 Parsons, 258; Story on Prom. 197; Goodman v. Harvey, 4 Ad. & E. 870; Swan v. N. B. Co., 2 Hurbst, etc. 184; Goodman v. Simonds, 20 How. (U. S.) 343; Murray v. Lardner, 2 Wall. (U. S.) 110; Hotchkiss v. National Bank, 21 Wall. (U. S.) 354; Hamilton v. Vought, 5 Vroom, 187; Phelan v. Moss, 67 Penn. St. 59; Comstock v. Hannah, 76 Ill. 550; Farrell v. Lovett, 68 Maine, 326; Trustees v. Hill, 12 Iowa, 474; Fox v. Bank, 30 Kan. 441.

[64] Belmour v. Hoge, 35 N. Y. 65.

[65] Magee v. Badger, 30 Barb. 246; Lafayeete, etc. v. St. Louis, 4 Mo. App. 276; Bank of Sherman v. Apperson, 4 Fed. Rep. 25; *Ex parte*, Estabrook, 2 Low. 547.

[66] Craft's Appeal, 42 Conn. 146.

[67] "Bona Fide Holder of Negotiable Paper—What is Bad Faith," 22 Cent. L. J. 437; "Excusable Negligence—What will Relieve the Maker of a Negotiable Instrument from his Liability to a Bona Fide Purchaser," 23 Cent. L. J. 149.

PARTNERSHIP—FIRM ASSETS—DEBT OF INDIVIDUAL MEMBER—DECLARATIONS AND ADMISSIONS—ESTOPPEL.

WILLIAMS V. LEWIS.

Supreme Court of Indiana, May 29, 1888.

1. *Partnership—Firm Assets—Private Debt of Individual Member.*—The individual debt of one of several partners can be paid out of partnership assets only when it is agreed to by all the members of the firm.

2. *Same—Declarations and Admissions—Property and Interests of Absent Partner—Estoppel.*—One partner cannot make declarations and admissions which lead to a levy upon and sale of certain articles of partnership property to satisfy a private debt of an absent partner, without notice, which will be binding upon him.

MITCHELL, J., delivered the opinion of the court:

Complaint by James W. Lewis, Benjamin W. Simmons, and James C. Long against John E. Williams, to set aside a constable's sale of certain personal property, and to enjoin the defendant from moving property alleged to have been wrongfully sold to and purchased by him at such sale. It is charged in the complaint that in February, 1885, the plaintiffs, as partners, under the name of Lewis, Simmons & Long, were owners of a stationary steam saw-mill, with engine, boiler, carriage-way, trucks, 11 saws, and other attachments complete—all of which were situate in the city of Vevay, Ind., and that the partnership affairs remained unsettled, the firm being still indebted to divers persons, whose names are set out. It is averred that a judgment had been recovered against James W. Lewis, one of the partners, for an individual debt, and that an execution had issued thereon, in virtue of which the constable had seized and sold the engine and boiler, and the saw-frame and 11 saws above mentioned, as the individual property of Lewis. It is further averred that the only interest which Lewis had in the property so levied upon and sold arose from his being a member of the firm of Lewis, Simmons & Long, and that the only interest Williams had was such as he acquired through the constable's sale above mentioned. It is averred that Williams and his employees were proceeding to tear down and remove the engine an boiler and other articles which he assumed to own in pursuance of the purchase made as above, and that to detach and remove those articles would render the residue of the partnership property practically useless. It was also charged that the defendant, Williams, was notoriously insolvent. Prayer that the sale be set aside, and the defendant enjoined from interfering with the property. Williams answered, among other defenses, that the firm of Lewis, Simmons & Long had ceased to transact business about a year before the sale under which he claimed, and that he

was not aware at the time he purchased the property that it belonged to the firm of Lewis, Simmons & Long. He alleged, further, that before the execution was issued Lewis claimed to own the whole of the property, and that he was offering to sell it to Simmons. He charged, further, that before he bought the property the constable to whom the execution was issued called upon Simmons, and informed him that he had an execution against the property of Lewis, and that he was about to levy on the property now in dispute, and that Simmons informed the defendant and the constable that the property belonged to Lewis individually, with the exception of a few dollars invested therein by the other partners in the way of repairs. It is averred that Simmons was in Vevay from the time of the levy until the day of the sale; that he knew the property was advertised for sale; and that he made no objection nor gave any notice of the claim of the firm, and that he again told Williams, on the day of the sale, that the property belonged to Lewis individually. The court sustained a demurrer to the answer, and the propriety of this ruling is made the principal subject of discussion.

That the interest of one partner in the goods or property of the firm may be siezed and sold upon execution for his individual debt cannot be doubted, and it is likewise settled that, as incidental to the right of sale, the officer may, without interfering with the rights of the other partners, taking possession of the interest seized, and deliver it to the purchaser, who takes subject to the rights of the other partners, and to the contingency that an accounting may show that he took no beneficial interest by the purchase. The purchaser cannot acquire specific articles of property at such a sale, but, if the creditor of one partner sells his debtor's interest in the firm property, the purchaser may ultimately obtain any surplus that may remain after the firm creditors are paid and the partnership accounts fully adjusted. *Ex parte* Hopkins, 104 Ind. 157, 2 N. E. Rep. 587; Deeter v. Sellers, 102 Ind. 458, 1 N. E. Rep. 854; Donellan v. Hardy, 57 Ind. 393; 2 Lindl. Partn. 690. Specific articles of partnership property cannot be levied upon and sold to satisfy the individual debt of one partner, and when the officer, instead of selling the whole interest of the execution debtor, sells the whole of certain specific articles of property belonging to a firm, the other owners may treat him as a trespasser, and may enjoin the sale or the delivery of the articles so sold. Stumph v. Bauer, 76 Ind. 157; Branch v. Wiseman, 51 Ind. 1; Moore v. Pennell, 52 Me. 162, 83 Amer. Dec. 500, and note; Spalding v. Black, 22 Kan. 55; Atkins v. Saxton, 77 N. Y. 195; Miner v. Pierce, 38 Vt. 610; 2 Lindl. Partn. 690. Without disputing the propositions above stated, it is contended on appellant's behalf that the declarations made by Simmons, one of the partners, to the effect that the property levied upon and sold was the individual propery of Lewis, estopped the former from afterwards asserting as against the appellant, who bought on the faith of his declaration that it was the property of the firm. It is insisted, moreover, that notice to Simmons that the property was about to be sold as the property of Lewis was notice to the firm, and that his acquiescence in the sale, and his declarations in respect to the title, not only estopped him, but the firm of which he was a member as well. It appears from the pleadings that both Lewis and Long were out of the State at the time and had no knowledge of the levy and sale; that, although the firm had ceased carrying on its business, the debts had not yet been paid, nor the partnership account settled, nor the partnership property disposed of. It is undoubtedly true that each partner is, in a qualified sense, the agent of his copartners in relation to the business of the firm, and that his acts and declarations in reference to the business in which he is at the time employed, within the scope of the partnership, are the acts and declarations of the firm; but one partner cannot, by his acts or declarations, in the absence of the others, deprive them or either of them of their interest in the firm property. Rush v. Thompson, 112 Ind. 158, 13 N. E. Rep. 665; Bays v. Connor, 105 Ind. 415, 5 N. E. Rep. 18; Hickman v. Reineking, 6 Blackf, 387; Bank v. Underhill, 102 N. Y. 336, 7 N. E. Rep. 293; Kaiser v. Fendrick, 98 Pa. St. 528. The agency which exists between partners pertains only to the business of the firm, and the declarations of one partner which bind the others are such as pertain to, and are made while employed about, the business of the partnership. Boor v. Lowrey, 103 Ind. 469, 3 N. E. Rep. 151; Winchester v. Creary, 116 U. S. 161, 6 S. C. Rep. 369; Avery v. Rowell, 59 Wis. 82, 17 N. W. Rep. 875. Certainly, one partner cannot admit away the interest of his copartners in the partnership property, or transfer the interest of one partner to the individual creditors of the other in the absence of both, nor can he, by his declarations, make that a partnership transaction which does not appear to be such. Blaker v. Sands, 29 Kan. 551. Whatever the motive of Simmons may have been in asserting that the property belonged to Lewis individually, the declaration was not made during the progress and within the scope of the partnership business. While one partner may, under certain circumstances, in the absence of the others, dispose of the firm property or pledge it for a firm debt, he cannot, by an admission in the absence of the other partners, convert that which was the property of the firm, into the property of one of its members, and thus divert it from the payment of partnership debts. Bond v. Nave, 62 Ind. 505. Neither can one member of a suspended firm, by standing by, estop the other members, who are absent, from asserting their interest in the partnership property. The present case is not within the principle which ruled Griswold v. Haven, 25 N. Y. 595, 82 Am. Dec. 380, and cases of that class. As stated in the head-note to that decision, one of a firm of warehousemen falsely represented

to a person, who advanced money on the faith of the representation, that the one to whom the money was advanced, and to whom he had given receipts in the firm name, had on storage a certain quantity of grain. It was held that where the authority of an agent or partner depends upon some fact outside the terms of his power, and which from its nature not peculiarly within his knowledge, his principal or firm is bound by his representation, though false, as to the existence of such fact. The decision in the case cited is controlled by the fact that the representation was made in connection with an act which the partner was authorized to perform, and the fact misrepresented formed part of and was within the power of the partner whose representation was relied on. Where a party, dealing with one partner in respect to a matter which corresponds in every particular with the business of the firm, relies upon the representation of the partner, as to any fact pertinent to the transaction in hand which rests peculiarly within the knowledge of the partner, the firm is bound. Declarations made by an agent or partner in response to timely inquiries relating to matters under his charge, in respect to which it is part of his business, in the usual course, to act or impart information, bind the principal or firm. Bank v. Stewart, 114 U. S. 224, 5 S. C. Rep. 845. It is, however, no part of the business of partners to enlarge, deny, or affect the respective interests of members of the firm in the partnership property, by declarations or admissions in the absence of each other. They are not constituted agents for each other for any such purpose. The agency extends merely to the conduct of the business of the firm. Woodruff v. Scaife, 3 South. Rep. 311. It is not to be doubted but that partnership assets may be transferred in payment or to secure an individual debt of one partner, but this can only be done while the property is in the possession of the owners, and by the consent of all the partners. Fisher v. Syfers, 109 Ind. 514, 10 N. E. Rep. 306; Machine Co. v. Bannon, 4 S. W. Rep. 831. Of course if one, seeing his property about to be levied on as the property of another, disclaims any ownership therein, or stands by and acquiesces in the sale, he will be estopped to assert a title as against an innocent purchaser. But a disclaimer by one partner cannot estop the others, unless it is known to, and ratified by, them, nor can the acquiescence of one bind the others, who had no notice. Caldwell v. Auger, 4 Minn. 217 (Gil. 156), 77 Am. Dec. 515, is not in conflict with this conclusion. While the answer may have been good, if no other interest than that of Simmons had been involved, since it was not good as an answer to the complaint by Lewis, Simmons & Long, as partners, the demurrer was properly sustained. The complaint was sufficient. It was not necessary that the plaintiffs should have tendered the money paid to the constable by Williams. The firm received no benefit from the money. Nor does it make any difference that the plaintiffs have a remedy at law to replevy the property carried away. They have a right to invoke the aid of the court to enjoin the defendant from tearing down their engine and boiler, and carrying it away, to the disruption and detriment of their property. The judgment is affirmed, with costs.

NOTE.—It is well settled that the payment of the private debt of one member of a partnership with partnership property is fraudulent, if such payment is without the assent of the other members of the firm.

As was observed by Mr. Justice Story fifty years ago in a case much quoted: "The implied authority of each partner to dispose of their partnership funds strictly and rightfully extends only to the business and transactions of the partnership itself, and any disposition of those funds, by any partner, beyond such purposes, is in excess of his authority as partner, and a misappropriation, for which he is responsible to the partnership.[1]

It is also true that one partner cannot bind his firm by giving a partnership note for his separate debt, unless the same is agreed to by the members thereof. Lack of authorization on their part is a perfect defense, except as against a *bona fide* indorsee.[2] For if one partner indorse and negotiate a note in the firm's name, but outside of the legitimate business of the company, a subsequent holder will be entitled to recover against the partnership on proving that he became a holder before maturity for a valuable consideration and without fraud.[3]

And we find it laid down in a Missouri case that "a partner has no right to appropriate the assets of the firm to the payment of his individual debts, nor to the payment of the individual debts of himself and his copartner, unless they are also debts of the firm."[4]

It has furthermore been held that a creditor of one partner cannot, although he is indebted to the firm, insist upon being credited upon his account with the amount due him from such partner, although the said

1 Rogers v. Batchelor, 12 Peters, 230. And see Cornells v. Stanhope, 14 R. I. 97; Chase v. Buhl Iron Works, 55 Mich. 139; Fance v. Campbell, 8 Humph. (Tenn.) 524; Cook v. Bloodgood, 7 Ala. 683; Arden v. Sharpe, 2 Esp. R. 524; Shirreff v. Wilks, 1 East, 48; Hemys v. Richards, 11 Barb. 312; Green v. Deakin, 2 Stark. 347; Burwell v. Springfield, 15 Ala. 273; Kingsbury v. Sharp, 28 N. W. Rep. 74; Minor v. Gow, 11 Smed. & M. 322; Pierce v. Pass, 1 Port. (Ala.) 232; Baird v. Cochran, 1 Serg. & R. 397; Johnson v. Hersey, 73 Me. 291; s. c., 10 Cent. L. J. 387; Hoxie v. Carr, 1 Sumn. 181; Kelly v. Greenleaf, 3 Story, 93; Story on Partnership, § 360; Hartley v. White, 12 Cent. L. J. 15; Todd v. Larab, 75 Pa. St. 155.

2 Rogers v. Batchelor, 12 Peters, 230; Fall River Union Bank v. Sturtevant, 12 Cush. 372; Wittram v. Van Wormer, 44 Ill. 525; Watt v. Kirby, 15 *Id.* 201; Van Alstyne v. Bertrand, 15 Tex. 177; Himelright v. Johnson, 40 Ohio St. 40; Gale v. Miller, 54 N. Y. 536; Davenport v. Runlett, 3 N. H. 386; Davis v. Cook, 9 Nev. 134; Klein v. Keyes, 17 Mo. 326; Ferguson v. Thacher, 79 *Id.* 571; Robinson v. Aldridge, 34 Miss. 352; Scott v. Dausley, 12 Ala. 714; Hastings Nat. Bank v. Hibbard, 12 N. W. Rep. 651; *In re* Dunkle, 7 N. B. R. 107; Cornells v. Stanhope, 14 R. I. 97; Ah Lep v. Gong Chay, 13 Oreg. 205; Osborne v. Thompson, 35 Minn. 229; Hagar v. Graves, 25 Mo. App. 164; Spaulding v. Kelly, 43 Hun, 301; Randall v. Hunter, 66 Cal. 512; Bays v. Connor, 105 Ind. 415.

3 Gildersleeve v. Mahony, 5 Duer, 383.

4 Farrar v. Hutchinson, 9 Adol. & Ellis, 641; Hilliker v. Francisco, 65 Mo. 598; Gram v. Caldwell, 5 Cow. 489; Everinghim v. Ensworth, 7 Wend. 326.

partner had agreed that the amount he owed should be liquidated in that manner.[5]

We also find it laid down that funds of an insolvent firm, paid by one partner upon his private debt, without the consent of his copartner, may be attached in the hands of the private creditor by trustee process in behalf of a firm creditor, the private creditor knowing when he received the funds that they belonged to the firm.[6] And furthermore, that the seizure and actual removal of specific chattels, known to belong to a partnership, on an execution against one partner for his private debt, and the exclusion of the firm from the possession of its property, constitutes a trespass, for which the firm may maintain an action at law against the officer.[7]

The presumption of fraud may, however, be rebutted by circumstances which go to show that the other members of the firm authorized the application of the partnership funds or property;[8] or that the partner had acquired, with the consent of his associates, an exclusive interest therein; or that from other circumstances the transaction was actually *bona fide* and unexceptionable, although it went to the discharge of the private debt by one partner only.[9]

And in an Iowa case, where the members of a firm individually signed a note, and obtained money thereon to pay a debt of one of the partners, who was charged on the books of the firm with the amount, and the assignee of the firm paid the note, with other notes signed in the firm name, it was held that, although the partnership creditors resisted on the ground that the note was an individual indebtedness, and should not be paid until all partnership debts were satisfied, the firm having become bound for the amount, that the claim being valid against the assignors was enforcible against the assignee.[10]

In short, the authorities hold that where a note or security, or fund of the firm has been taken in discharge of a separate debt of one partner, the burden of proof is on the holder or creditor to show circumstances sufficient to repel every presumption of fraud, or collusion, or misconduct, or negligence on his own part, unless, indeed, the circumstances already in proof on the other side, repel such presumption.[11]

And furthermore, where partnership notes are given by one member of a firm to liquidate his private debt, the partners will not ordinarily be obliged to show that the creditor knew at the time that it was a misapplication of funds, on the ground that the nature of the transaction should put him on inquiry.[12]

It seems well settled that where a partner wrongfully uses the partnership funds to pay his individual debts, the partnership cannot maintain an action at law for their recovery, because the guilty partner is a necessary party plaintiff, and cannot be heard to allege his own default as a ground for recovery.[13]

As to whether an action may be sustained in the name of one partner alone, where the copartner and another person have jointly committed a fraud upon the partnership, the courts have differed.[14]

As was observed in a recent case, "the rule which precludes the partnership from suing at law for funds so misappropriated, is purely technical, and ought not to be applied to defenses further than is clearly required.[15]

SOLON D. WILSON.

[5] Harlow v. Rosser, 28 Ga. 219; Minor v. Gaw, 11 Smed. & M. 322; Pierce v. Pass, 1 Port. (Ala.) 232; Price v. Hunt, 59 Mo. 258; Armistead v. Butler, 1 Hen. & M. (Va.) 176; Coate v. Bloodgood, 7 Ala. 683, 688.

[6] Johnson v. Hersey, 73 Me. 291; s. c., 10 Cent. L. J. 387; Craughton v. Forest, 17 Mo. 131; Forney v. Adams, 74 *Id.* 138.

[7] Sanborn v. Rayce, 14 Reporter, 312; Flanagan v. Alexander, 50 *Id.* 50; Snyder v. Lunsford, 9 W. Va. 223.

[8] Wheeler v. Rice, 8 Cush. 205; Sweetser v. French, 2 *Id.* 309; Bank of Kentucky v. Brooking, 2 Litt. 41; Baird v. Cochran, 1 Serg. & R. 397.

[9] *Ex parte* Agace, 2 Cox, 312; Ridley v. Taylor, 13 East, 175; Wintle v. Crowther, 1. Cromp. & G. 316.

[10] *In re* Stewart, 17 N. W. Rep. 897.

[11] Lloyd v. Freshfield, 8 Dowl. & Ryl. 9; Foot v. Sabin, 19 Galnis, 154, 157, 158; Gapsevoort v. Williams, 14 Wend. 133.

[12] Rogers v. Batchelor, 12 Peters, 229; Powell v. Messer, 18 Tex. 407.

[13] Jones v. Gates, 4 M. & R. 613; Wallace v. Kelsall, 7 M. & W. 264; Gordon v. Ellis, 7 M. & G. 607; Greeley v. Wyeth, 10 N. H. 15; Homer v. Wood, 11 Cush. 62; Toy v. Ladd, 15 Gray, 296; Farley v. Lovell, 103 Mass. 387.

[14] Wells v. Mitchell, 1 Gr. L. R. 484; Miller v. Price, 20 Wis. 117; Calkins v. Smith, 48 N. Y. 614; Hargar v. Graves, 25 Mo. App. 168.

[15] Cornells v. Stanhope, 14 R. I. 99, citing Kendall v. Wood, L. R. 6 Exch. 243; Brewster v. Matt, 5 Ill. 378; Rogers v. Batchelor, 12 Peters, 221. See leading article, "Payment of the Liabilities of Copartners," 11 Cent. L. J. 221. Also Hartley v. White, 12 *Id.* 15; Davis v. Howell, 12 *Id.* 350; Louden v. Ball, 18 *Id.* 409.

JURISDICTION—STATE AND FEDERAL COURT—RECEIVERS—FEDERAL QUESTION.

CALHOUN V. LANAUX.

United States Supreme Court, May 14, 1888.

1. *Jurisdiction—Conflict Between State and Federal Courts—Receivers.*—A stockholder in a consolidated association of New Orleans gave to the association a mortgage on certain lots to secure the payment of subscriptions for stock. The subscriptions were paid, but the mortgage was not canceled. Receivers were appointed, after which time application was made to the State court for a *mandamus* to compel the receiver to cancel the mortgage. The stockholders and receivers were made parties. The question of jurisdiction being raised, it was held that the proceeding was against the corporation, and not against the receiver, and that the State court had jurisdiction.

2. *Same—Enjoining State Court.*—Upon application of receivers, the circuit court might, if it saw fit, enjoin proceedings in the State court.

3. *Same—Federal Question Raised for First Time on Appeal.*—It is too late to raise a federal question for the first time on a petition for writ of error in the federal court. But failure to raise the question in apt time did not in this case affect the result.

Mr. Justice BRADLEY delivered the opinion of the court:

This case arose upon a petition filed in the civil district court for the parish of Orleans, January 23, 1884, by Lanaux, the defendant in error, praying for a *mandamus* against Eugene May, the recorder of mortgages for the same parish, commanding him to cancel and erase from the books of his office all inscriptions against certain property of the petitioner in favor of the Consolidated Association of the Planters of Louisiana, partic-

ularly certain inscriptions designated in the petition as being those of a mortgage on three certain lots in New Orleans, dated June 6, 1843, given to secure the payment of a subscription for 15 shares of the capital stock of the company, of $500 each. The State of Louisiana, through its attorney general, the Consolidated Association of the Planters of Louisiana, through its liquidators, and Henry Denis and others, holders of bonds of the State, secured by pledge of the mortgage above mentioned, were made parties to the proceeding. The interest of the collateral parties arose in this way: The mortgage was originally given by one Lebau to secure the payment of his subscription for the 15 shares of stock, and, with the like mortgages of other subscribers, and the other assets of the corporation, was pledged by the company to the State as security for paying certain bonds issued by the State in favor and aid of the company. Hence the interest of the State. The other parties were holders of these bonds of the State, and claimed to be subrogated to its rights. The petitioner alleged that by an act of the legislature of Louisiana, passed in 1847, and by the action of the liquidators of the company (which had become insolvent), the stockholders were called upon to contribute $102 per share as a fund to meet the obligations of the State, payable in yearly installments of $6 each, for the period of 17 years; and that all these installments had been paid on the 15 shares secured by the mortgage in question. The petitioner further stated that in the case of Association v. Lord (one of the stockholders *in consimili casu*), 35 La. Ann. 425, the Supreme Court of Louisiana had decided that the payment of the said installments discharged the obligations of the stockholders both as to the subscription and mortgage. He further stated that the mortgage kept his lots out of commerce, and that he had no adequate relief except by *mandamus* to the recorder. Prior to the filing of this petition, the circuit court of the United States for the eastern district of Louisiana had appointed receivers of the said Consolidated Association of Planters, and a copy of the petition was served on them. The attorney general of Louisiana appeared, and filed an exception to the proceeding by *mandamus*, claiming that the petitioner could only have relief by a plenary suit, *via ordinaria;* and that it was, in fact, a suit against the State, which could not lie without its consent, and that the State declined to be made a party of the proceeding. The recorder of mortgages appeared, and contended that he could not be required to cancel the inscription of the mortgages until it had been judicially declared that they were not valid and existing securities by proceedings *via ordinaria*, by way of citation contradictorily had with the parties claiming the benefit of the mortgages. The holders of the State bonds, Denis and others, appeared, and denied the allegations of the petition, and pleaded that the court had no jurisdiction of the demand of the relator, because receivers had been appointed to the Consolidated Association of Planters by the circuit court of the United States, and that court only could entertain jurisdiction of the matter. The receivers of the association, appointed by the circuit court, did not appear, and offered no objection to the proceeding. The cause was tried, and the civil district court, for some reason not shown, dismissed the petition. The case was then appealed to the Supreme Court of Louisiana, which, on the first hearing, affirmed the judgment; but on a rehearing reversed it, and granted a *mandamus* as prayed.

On the question of jurisdiction raised by the plea of the bondholders, the court said: "The point made that this court is without jurisdiction because receivers have been appointed for the Consolidated Association by the United States circuit court is untenable, when the object of the proceeding is to erase from the mortgage book of the State an incumbrance created by the law, and which the circuit court of the United States would have no authority to order." As this presents the only federal question raised in the case, we have no occasion to consider any other. If the State court had jurisdiction of the proceedings, its judgment cannot be impeached on the present writ of error, for that is the only objection made to it on federal grounds. The objection is that the court has no jurisdiction because the United States court had appointed receivers of the association. The simple fact that the said court had appointed such receivers is the only fact disclosed in the record, so far as the proceedings in the circuit court of the United States are concerned, until after final judgment had been rendered in the Supreme Court of Louisiana; and this fact only appeared by the statement of the defendants Forstall and Denis in their answer. After final judgment of the supreme court was rendered, John Calhoun, who had become sole receiver, together with Denis, one of the State bondholders, presented to the supeme court a petition for an order to call on the other defendants to join them in an application for a writ of error in this court, and, if they refused, then that such writ be allowed to the petitioner alone. To this petition was annexed a copy of an order of the circuit court, made December 29, 1883, in a cause in which William Cressey was complainant, and the Consolidated Association of Planters were defendants, for an injunction, and the appointment of receivers, enjoining the defendants from disposing of the association's assets or property; and appointing John Calhoun, T. J. Burke, and George W. Nott as receivers in the cause, and directing them forthwith to take possession of all the property and assets of the said association, and proceed to administer the same under the direction of the court, and collect all accounts due said association, and all parties having possession of assets, securities, books, paper, vouchers, or effects of said association, be ordered to deliver up the same to said receivers, and that said receivers be vested with all the rights and powers of re-

ceivers in equity in this cause. A subsequent order, a copy of which was also annexed to the petition for writ of error, continued Calhoun and Burke as receivers, and specified more minutely their powers and duties, not materially differing from the above. By another order, made in June, 1884, a copy of which was also annexed to the petition, Burke was relieved, and Calhoun was continued as sole receiver. The other defendants having declined to join in the writ of error, the court made the following order on the application for writ of error: "ORDER. The exceptions filed by Forstall's Sons and Denis to the jurisdiction of the district court were filed after the general issue had been pleaded. They do not appear to have been urged in the lower court, as no evidence was offered to show jurisdiction in the fifth circuit court, eastern district of Louisiana, and were not passed upon, as the judgment of the lower court dismissed the application on a question of proceeding. On appeal no allusion was made to them, and no action of the appellate court was asked on them. The exceptors have taken a chance for a decision in their favor on the merits. After getting one against them they cannot be allowed the relief now sought. Mays v. Fritton, 20 Wall. 414. The application for a writ is refused. New Orleans, March 26, 1885. E. Bermudez, Chief Justice." We think that copies of the orders made by the circuit court, which were annexed to the petition for a writ of error, were produced in the case altogether too late to constitute any ground for importing a federal question into the cause, although we do not perceive that it would have made any difference in the result if they had been presented regularly in the court of first instance.

Taking the case, then, as it stood when the final decision of the Supreme Court of Louisiana was made, we have simply to decide whether the single fact that the circuit court had appointed receivers of the association deprived the State court of all jurisdiction of the petition for *mandamus*. We have seen that the Supreme court of Louisiana decided that it did not, and we have seen the reason why they supposed it did not, namely, that the circuit court had no authority to order an erasure of a mortgage on the records of the State. We should hesitate to concur with the State court in the opinion that the circuit court of the United States would have no authority to order the erasure of an incumbrance from the mortgage book of the State. The courts of the United States, in cases over which they have jurisdiction, have just as much power to effectuate justice between the parties as the State courts have. But we do not suppose that the jurisdiction of the State court in the present case depends on the incapacity of the circuit court to afford relief, but on its own inherent powers, and the fact that such jurisdiction has not been taken away by the proceedings in the federal court. We held in a number of cases that the jurisdiction of the State courts over controversies between parties, one of whom was proceeded against under the late national bankrupt law, was not taken away by bankruptcy proceedings, although a suit against the bankrupt might be suspended by order of the bankruptcy court until he obtained or was refused a discharge. See Eyster v. Gaff, 91 U. S. 521; Claflin v. Houseman, 93 U. S. 130; Mays v. Fritten, 20 Wall. 414; McHenry v. La Societe Francaise, etc., 95 U. S. 58. In the case of Bank v. Bank, 14 Wall. 383, we decided that suit might be brought in a State court against a national bank, although it had made default in paying its circulating notes, and a receiver of the bank had been appointed by the comptroller of the currency. *A fortiori*, a company may be sued whose assets have been placed in the hands of a receiver in an ordinary suit in chancery. It is objected, however, that no action can be commenced against receivers without permission of the court which appointed them; and reference is made to Barton v. Barbour, 104 U. S. 128, and Davis v. Gray, 16 Wall. 203. This not an action against the receivers, but against the consolidated association and the recorder of mortgages. The receivers were notified of the proceeding by being served with a copy of the petition, so as to give them an opportunity of objecting if they saw fit to do so. They did not appear, and made no objection. The State bondholders were made parties, and they did appear. We are not concerned, however, with the proceedings, or the merits of the case, but only with the question of the jurisdiction of the court. Of this we have no doubt. Perhaps the circuit court, on application of the receivers, might have interfered to prevent the petitioner from proceeding in the State court, had they thought proper to make such an application; but they did nothing of the kind. This was not the case of a proceeding in the State courts to deprive the receivers of property in their possession as such. That would have been a different thing, and the State court would not have had jurisdiction for such a purpose. This was only a case for enforcing the right of the petitioner to have canceled on the books of the recorder a mortgage which had been satisfied and paid, not interfering in any way with the possession of the receiver. We are satisfied that the State court had jurisdiction of the case, and the judgment of the supreme court is affirmed.

NOTE.—The weight of authority is that a suit cannot be prosecuted against a receiver without first obtaining leave of the court whose officer the receiver is. If a suit is commenced in another forum, a plea as to the jurisdiction of the court is good.[1] Authorities are nearly uniform than an attempt to disturb property in the hands of a receiver is liable to restraint, and may subject the offender to punishment for contempt of court.[2]

[1] Wiswall v. Sampson, 14 How. 52; Angel v. Smith, 9 Ves. 335; Kennedy v. Ind. R. Co., 11 Cent. L. J. 89; Beach on Receivers, § 655; Barton v. Barbour, 14 Cent. L. J. 347; High on Receivers, § 254 and citations.

[2] Authorities *supra;* Allen v. Cent. R. Co., 3 Cent. L. J. 434; Kinney v. Crocker, 18 Wis. 75; Story's Eq. § 831;

A suit commenced against a corporation may be prosecuted to a conclusion, notwithstanding the fact a receiver has been appointed. The court appointing the receiver will, on cause shown, enjoin such suit, but the mere fact that a receiver is appointed will not, *ipso facto*, suspend all litigation commenced against the corporation before the receiver was appointed, or affect suits commenced afterward, provided the latter do not concern the custody of property in the hands of a receiver. Decree and sale in foreclosure suit will divest the receiver of all interest in the property; the receiver may intervene and assert any right he may have, or he may even secure an injunction.[3]

In Allen v. Cent. R. Co., it was held that suit might be conducted to a conclusion against a corporation for personal injury occurring after the designation of a receiver, but before he qualified; that judgment obtained could not be satisfied out of property held by the receiver without asking aid of the court appointing the receiver, but that the judgment might be enforced against the corporation after it resumed possession.

In Kinney v. Crocker, it was held that suit might be commenced against the receiver without obtaining leave of the court appointing the receiver, but that the latter court may, if it see fit, interpose.

In Chautauque Co. Bank v. Risley,[4] the court held that a person having a superior legal title or lien ought to obtain leave of court before disturbing the possession of the receiver, but that the question was one of contempt, and that the fact that a receiver was appointed did not destroy the right to enforce such superior legal right at law. The same principle was held in Hackley v. Draper.[5]

In Thompson v. Scott,[6] it was held that the fact that there is no attempt to disturb property in the hands of a receiver will not excuse the institution of legal proceedings against a receiver.

But a distinction is made between suits commenced against a receiver and suits commenced against a corporation. Suits against the latter may be allowed to go on, but the court appointing the receiver will interfere if cause is shown.[7]

But if the receiver takes possession of property on which there is a lien or incumbrance before the creditors bring a suit to enforce the same, the latter must submit the claim to the court appointing the receiver for adjudication.[8]

In Indiana and Illinois, by statute, a corporation is liable in all statutory actions, and provisions made for commencement of suit against receiver, in usual way, by service on conductor, etc. But such statute will not authorize a suit against a receiver if he is an officer of a federal court.[9]

A corporation cannot be held liable for the acts of a receiver or his agents, and unless provision is made in the order discharging the receiver, the complainant will have no remedy against any property reverting from the receiver to the corporation.[10]

But proceedings against a receiver will render the property in his hands liable for any damages or expenses found due. If the corporation takes the property before the amount is ascertained to be due, it takes it *cum onere* as to these claims.[11]

If a receiver, by mistake or wrongfully, takes possession of property belonging to another, the owner may bring suit against him personally; the receiver's act is *ultra vires*. Leave of court need not be obtained to sue him.[12]

Recent Act of Congress: "That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with the property without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."[13] N. C. MILLER.

Jones on Railway Securities, §§ 502-3; Kerr on Receivers, § 168; Brooks v. Vt. Cent. R. Co., 22 Fed. Rep. 211; Jackson v. Lahee, 114 Ill. 287; Thompson v. Scott, 3 Cent. L. J. 737.

[3] Eyster v. Gaff, 91 U. S. 521; Calhoun v. Lanaux, *supra;* Heath v. Mo., etc. R. Co., 20 Cent. L. J. 193; Brooks v. Vt. Cent. R. Co., 22 Fed. Rep. 211; Wyatt v. O. & M. R. Co., 10 Bradw. 289.

[4] 19 N. Y. 376.

[5] 60 N. Y. 88.

[6] *Supra.*

[7] Calhoun v. Lanaux, Wyatt v. O. & M. R. Co., Allen v. Cent. R. Co., *supra;* O. & M. R. Co. v. Russell, 115 Ill. 57.

[8] Barton v. Barbour, Wiswall v. Sampson, Thompson v. Scott, Angel v. Smith, *supra;* Kerr v. Breckenridge, 96 Ind. 69.

[9] Kennedy v. Ind. R. Co., *supra;* Story's Eq. § 833; High on Receivers, § 151; Hale v. Duncan, 7 Cent. L. J. 146; Thompson v. Scott, *supra.*

[10] Davis v. Duncan, 18 Cent. L. J. 249; Rogers v. Mobile R. Co., 17 Cent. L. J. 290; Allen v. Cent. R. Co., Heath v. Mo. R. Co., *supra;* Metz v. Buffalo, etc. R. Co., 58 N. Y. 61; Turner v. Hannibal, etc. R. Co., 6 Am. & Eng. Ry. Cas. 38.

[11] Davis v. Duncan and citation, Kennedy v. Ind. R. Co., *supra.*

[12] Parker v. Browning, 8 Paige, 388; Paige v. Smith, 99 Mass. 395; Hills v. Parker, 111 Mass. 508.

[13] Act of March 3, 1887; Removal of Causes No. 3, U. S. Stat. 1886-1887, 552.

WEEKLY DIGEST

Of ALL the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States.

1. ACTION — Splitting. —— An entire claim, arising from a single wrong, cannot be divided and made the subject of several suits. — *Wichtia & W. R. R. v. Beebe*, S. C. Kan., June 9, 1888; 18 Pac. Rep. 502.

2. ADMIRALTY—Jurisdiction.—— The State court has jurisdiction of a bill alleging that the complainant is the owner of a claim for damages inflicted by enemies cruisers, such claim having been allowed by the court of claims and judgment rendered that the amount should be paid to or distributed among the owners of the claim. — *Soper v. Manning*, S. J. C. Mass., May 7, 1888; 16 N. E. Rep. 752.

3. ANIMALS—Impounding—Estray—Statute. ——Construction of Indiana statutes relative to impounding cattle running at large. Rule as to estrays. — *Jones v. Clauser*, S. C. Ind., April 18, 1888; 16 N. E. Rep. 797.

4. APPEAL—Demurrer—Counterclaim—Pleading.—— A demurrer to a counterclaim will be overruled upon appeal if it appears that upon a former trial one of the paragraphs setting it up was held good. — *McCormick, etc. Co. v. Gray*, S. C. Ind., April 17, 1888; 16 N. E. Rep. 787.

5. APPEAL — Evidence. —— Where the evidence is conflicting, the verdict of the jury will not be disturbed. — *Lohr v. Somerset, etc. Co.*, S. C. Penn., May 21, 1888; 14 Atl. Rep. 269.

6. APPEAL—Instructions—Bill of Exceptions.——The action of the court in giving or refusing instructions cannot be reviewed, unless they are incorporated in the bill of exceptions. — *Banks v. Hoyt*, S. C. Colo., June 1, 1888; 18 Pac. Rep. 448.

7. APPEAL—Instructions — Evidence. —— When the record contains no part of the evidence, the judgment will not be disturbed on account of instructions alleged to be erroneous, unless it appears that such instructions would have been erroneous under every conceivable state of facts.—*McCloskey v. Kreling*, S. C. Cal., June 9, 1888; 18 Pac. Rep. 433.

8. APPEAL — Issues — Waiver. —— When allegations were by consent manifestly litigated at the trial as though they were put in issued by the written pleadings, they will be treated on appeal as though they were put in issue. — *Clark v. City of Austin*, S. C. Minn., June 11, 1888; 38 N. W. Rep. 615.

9. APPEAL—New Trial—Order.——The order granting a new trial is affirmed under Crosby v. Railway Co., 34 Minn. 413. — *Congdon v. Bailey*, S. C. Minn., June 22, 1888; 38 N. W. Rep. 629.

10. APPEAL—New Trial— Sufficiency of Evidence.—— On appeal the action of the trial court will be sustained in setting aside a verdict not supported by a clear preponderance of evidence. — *Cable v. Byrne*, S. C. Minn., June 5, 1888; 38 N. W. Rep. 620.

11. APPEAL—Review— Evidence. —— Where there is evidence to sustain a finding, it will not be reviewed on appeal.— *Gibson v. Barber*, S. C. N. Car., May 22, 1888; 6 S. E. Rep. 766.

12. APPEAL—Setting Aside Judgment—Review. ——A motion to set aside a judgment under Code N. C. § 274 is not reviewable on appeal unless the trial court states in its ruling that it has no power to grant the motion.— *Clemmons v. Field*, S. C. N. Car. May 22, 1888; 6 S. E. Rep. 790.

13. APPEAL—Special Findings— Review. —— A statutory claim suit was submitted to the court without a jury on an agreed statement of fact, the sole question being the right of property: *Held*, that on appeal the court must review the evidence, since the judgment is a special finding, under Alabama law.—*Hardy v. Ingram*, S. C. Ala., May 31, 1888; 4 South. Rep. 372.

14. APPEAL — Sufficiency of Evidence. —— The findings of the court will not be disturbed on appeal, since the evidence sustains them. — *Mason v. Marshall*, S. C. Kan., June 9, 1888; 18 Pac. Rep. 488.

15. APPEAL—Time of Taking.—— A motion for a new trial, filed within five days after judgment rendered, but not acted on within ten days after judgment rendered, is considered overruled on the tenth day, and ten days remain thereafter for filing an appeal bond.— *Jones v. Collins*, S. C. Tex., May 25, 1888; 8 S. W. Rep. 681.

16. APPEAL—Verdict—New Trial. —— Whether a verdict is against the weight of evidence, and an application for a new trial based on newly discovered evidence, or addressed to the discretion of the trial judge, and the supreme court will not review his decision.—*Redmond v. Stepp*, S. C. N. Car., May 7, 1888; 6 S. E. Rep. 727.

17. APPEAL—Weight of Evidence. —— When there is some evidence to support the judgment, it will not be reversed on the weight of evidence.—*Walker v. Douglas*, S. C. Kan., June 9, 1888; 18 Pac. Rep. 503.

18. ARBITRATION AND AWARD—Appeal — Statute — Affidavit. —— Construction of Pennsylvania statutes authorizing an appeal from the award of arbitrators. Where the prescribed affidavit is not made within the limited time it cannot be made afterward *nunc pro tunc*, and the appeals fails.—*Dale v. Elder*, S. C. Penn., May 14, 1888; 14 Atl. Rep. 258.

19. ARBITRATION AND AWARD — Estoppel in Pais. —— Where a person's name appears as duly signed to a submission to arbitration, and he was present when the arbitration was had and the award was made, testified as a witness before the arbitrators, and knew that his rights were involved, he is estopped from denying the facts found by the award, though he did not sign the submission nor authorize his name to be subscribed thereto. — *Johnson v. Cochran*, S. C. Ga., May 21, 1888; 6 S. E. Rep. 809.

20. ASSIGNMENT — Benefit of Creditors— Mortgage — Statute—Lien.——Construction of Pennsylvania statutes regulating assignments for benefit of creditors. Priority of lien of a mortgage under that statute over judgments rendered on the same day the mortgage was recorded.—*Appeal of Richey*, S. C. Penn., May 14, 1888; 14 Atl. Rep. 235.

21. ASSIGNMENT—Contract.——A contract for the sale of wood, under which certain advances were made, may be assigned by the party in whose favor the balance is due.—*Porter v. Young*, S. C. App. Va., May 17, 1888; 6 S. E. Rep. 803.

22. ASSIGNMENT FOR CREDITORS— Death of Assignor—Executor De Son Tort.——A assigned for the benefit of his creditors to B, who went into possession and commenced to dispose of the property. A died, and B disposed of all the property and applied most of the proceeds to the payment of the debts specified: *Held*, that B was not liable as executor *de son tort*, though the assignment was void.—*Chattanooga S. Co. v. Adams*, S. C. Ga., June 1, 1887; 6 S. E. Rep. 695.

23. ATTACHMENT—Costs of Keeping Property. ——By the employment of a keeper for attached property a sheriff does not make himself personally responsible for his wages, unless he shall expressly agree to pay the same.—*Hawley v. Dawson*, S. C. Oreg., June 7, 1888; 18 Pac. Rep. 592.

24. ATTACHMENT—Damages—Sale of Goods.——In an action on an attachment bond for wrongfully suing out an attachment, no recovery can be had for damages caused by the sheriff's selling the goods in quantity and not in detail. — *Jefferson C. S. Bank, v. Eborn*, S. C. Ala., May 29, 1888; 4 South. Rep. 386.

25. ATTACHMENT—Dissolution— Depositions.——On a motion to dissolve an attachment depositions may be used in evidence, though they were taken on insufficient notice. They fulfill the statutory definition of affidavits.—*Hanna v. Barrett*, S. C. Kan., June 9, 1888; 18 Pac. Rep. 497.

26. BANKS AND BANKING—Stockholders — Partnership. ——Where the charter of a bank prescribes that each stockholder shall be liable to the creditors of the bank to an amount equal to that of his stock, the stockholders are partners *quoad* the creditors, and not sureties for the bank. —*Schalveky v. Field*, S. C. Ills., May 9, 1888; 16 N. E. Rep. 904.

27. BILLS AND NOTES — Indorsement — Suing Maker. —— Under Alabama law, to hold an indorser of a prom-

issory note payable on call, suit must be brought against the maker at the first court after the indorsement, not the first court after demand for payment. — *Mobile S. Bank v. McDonnell*, S. C. Ala., Dec. 7, 1887; 4 South. Rep. 346.

28. CARRIERS—Connecting Lines.—— Where a carrier contracts to transport cotton to a point on connecting lines without limiting his liability, the owner cannot sue on the contract a connecting line for a loss occurring on its route. — *Alabama, etc. R. R. v. Mount V. Co.*, S. C. Ala., May 23, 1888; 4 South. Rep. 356.

29. CARRIER—Damages. —— Where the bill of lading declared that the damages to the goods should not exceed the invoice value, and the goods were damaged to an amount less than the invoice value but were in their damaged condition worth more than the invoice value and the cost of importation, the carrier was held liable for the actual damages.— *Brown v. Cunard, etc. Co.*, S. J. C. Mass., May 4, 1888; 16 N. E. Rep. 717.

30. CHATTEL MORTGAGE—Execution.—Statute.——An officer who levies an execution upon goods mortgaged or pledged in accordance with the statutes of Indiana, on that subject is liable in trover for the value of such goods. — *Syfers v. Bradley*, S. C. Ind., April 24, 1888; 16 N. E. Rep. 805.

31. COLLISIONS—Signals— Contrary Maneuvers.——A vessel, that agrees by signal to pass ahead of another vessel and thereafter stops without reasonable necessity, is in fault if a collision ensues.— *The St. Johns*, U. S. D. C. (N. Y.), April 6, 1888; 34 Fed. Rep. 763.

32. COLLISION—Weight of Evidence.—— In a libel for a collision, the weight of evidence being in favor of the claimant, and the record showing that libelant had grossly exaggerated the circumstances and damages, the libel was dismissed. — *The Grand Isle*, U. S. C. C. (La.), April 6, 1888; 34 Fed. Rep. 767.

33. CONSTITUTIONAL LAW — Assessment—Statute.—— A statute of Indiana authorizing a city council to order an assessment of property for street improvements, but which provides no notice to be given to parties interested and no hearing of any complaint therefor, is not in contravention of the constitution of the United States.—*Garvin v. Dausmann*, S. C. Ind., May 8, 1888; 16 N. E. Rep. 826.

34. CONSTITUTIONAL LAW — Patent—Statute. —— The statute of Pennsylvania which requires that a note given for a patent right shall have that fact indicated upon its face, and shall be subject to all equities, and making it a misdemeanor to evade or disobey that law, is constitutional, and does not infringe the constitution or patent laws of the United States. — *Shires v. Commonwealth*, S. C. Penn., May 14, 1888; 14 Atl. Rep. 251.

35. CONTRACT—Consideration—Forbearance.——Forbearance by a creditor to present his claim against an estate, there being no agreement on his part to that effect, is not sufficient consideration to support a promise by the widow of the deceased to pay the claim. — *Shadburne v. Daly*, S. C. C. Cal., May 31, 1888; 18 Pac. Rep. 403.

36. CONTRACTS—Illegal—Executed — Rights of Parties. ——When a contract is unlawful and opposed to good morals and public policy, neither party can sue to enforce it, but after the transaction has become an accomplished fact, neither party can interpose such illegality or turpitude as a defense.— *Antonie v. Smith*, S. C. La., May 28, 1888; 4 South. Rep. 321.

37. CONTRACT — Interest. —— Where by contract defendant was to pay for a party wall, the value of which was to be ascertained by appraisement, the plaintiff cannot maintain an action until the appraisement is made, or the defendant does something to obstruct it, nor can he claim interest on the amount, the demand being unliquidated. — *Thorndike v. Wells, etc. Co.*, S. J. C. Mass., May 4, 1888; 16 N. E. Rep. 747.

38. CORPORATION—Stockholders—Insolvency—Statute. ——Construction of Pennsylvania statutes relative to the liability of shareholders in banking and other corporation in case of the insolvency of such corporation. What are the rights of shareholding creditors in such a case. — *Appeal of Schlandecker*, S. C. Penn., May 14, 1888; 14 Atl. Rep. 229.

39. CRIMINAL LAW—Bribery—Illegal Arrest.——When a constable arrests a party without a warrant on an unsworn charge of theft, and then in consideration of $25 paid by the prisoner's father allows him to escape, he is guilty, under Texas law, of accepting a bribe and of allowing the prisoner to escape in consideration thereof. — *Moseley v. State*, Tex. Ct. App., June 6, 1888; 8 S. W. Rep. 652.

40. CRIMINAL LAW — Carrying Weapons — Elections. —— On a trial for carrying dangerous weapons on election day, defendant cannot object that the election was void, the election being actually held under color of law. — *Cooper v. State*, Tex. Ct. App., June 5, 1888; 8 S. W. Rep. 654.

41. CRIMINAL LAW — Carrying Weapons—Soldier.—— A United States soldier, while in the actual discharge of his duty, carrying a pistol issued to him to by a superior officer to be used while on duty, is not amenable to the State law prohibiting the carrying of a pistol. — *Lann v. State*, Tex. Ct. App., May 20, 1888; 8 S. W. Rep. 650.

42. CRIMINAL LAW—Discharge—Statute.—— Construction of Illinois statute relative to the discharge of a person indicted for crime if he shall not be tried at the second term after his arrest. — *Dougherty v. People*, S. C. Ills., May 9, 1888; 16 N. E. Rep. 852.

43. CRIMINAL LAW — Disturbing Public Worship. —— An information for disturbing a Sunday-school by loud and vociferious expressions and swearing, is not sustained by proof of laughing and talking in the back part of the building where defendants were.—*Lyons v. State*, Tex. Ct. App., May 7, 1888; 8 S. S. W. Rep. 643.

44. CRIMINAL LAW — False Imprisonment — Evidence. —— A conviction of A for false imprisonment of B is not sustained by evidence, that certain parties forced B to sign a paper recanting certain statements, and that A, who was separated from all the parties by a fence, did not interfere. —*Walker v. State*, Tex. Ct. App., May 23, 1888; 8 S. W. Rep. 637.

45. CRIMINAL LAW — Former Conviction — Pleading. —— Upon an information of aggravated assault and battery, under Texas law a former conviction must be specially pleaded, and the defendant must verify such plea. — *Samuels v. State*, Tex. Ct. App., June 6, 1888; 8 S. W. Rep. 656.

46. CRIMINAL LAW—Gaming on Premises — Ownership. —— On a trial for permitting a game at cards to be played on premises appurtenant to a house for retailing liquors, a deed of conveyance to defendant is admissible to show ownership in him.— *Biles v. State*, Tex. Ct. App., May 23, 1888; 8 S. W. Rep. 650.

47. CRIMINAL LAW — Homicide — Evidence. —— Evidence that defendant went to the house where his wife was working as a cook, and that soon thereafter she was found senseless and severely beaten on the head with a blunt instrument, sustains a verdict of murder, in connection with his confession that he killed her that night with a steelyard. — *Williams v. State*, Tex. Ct. App., June 6, 1888; 8 S. W. Rep. 653.

48. CRIMINAL LAW — Homicide — Instructions. —— When on a trial for murder committed in the perpetration of rape, the instructions are full on the subject of murder, and others are not asked, defendant on a motion for a new trial cannot object that the court failed to charge on murder in the perpetration of rape. — *Washington v. State*, Tex. Ct. App., May 2, 1888; 8 S. W. Rep. 642.

49. CRIMINAL LAW—Information— Venue. —— Where the information fails to allege the venue, it will be quashed, though the complaint alleges the venue. — *Smith v. State*, Tex. Ct. App., May 23, 1888; 8 S. W. Rep. 645.

50. CRIMINAL LAW—Instructions— Proof of Guilt.—— An instruction in a criminal case that, if on a partial

consideration of the evidence the jury was satisfied beyond a reasonable doubt of the guilt of the defendant, they should find him guilty, is erroneous. — *Evans v. State*, S. C. Miss , May 7, 1888; 4 South. Rep. 344.

51. CRIMINAL LAW— Instructions— Reasonable Doubt. —— It is reversible error to refuse an instruction, that the burden is on the State to prove every element of the crime charged beyond a reasonable doubt, when no other instruction is given stating the law of reasonable doubt. — *People v. Cohn*, S. C. Cal., June 1, 1888; 18 Pac. Rep. 410.

52. CRIMINAL LAW — Instructions — Reconciling Evidence. —— An instruction, that the jury must make a reversible and conscientious endeavor to reconcile the facts and evidence with the defendant's innocence, is erroneous. — *People v. Madden*, S. C. Cal., June 9, 1888; 18 Pac. Rep. 402.

53. CRIMINAL LAW—Larceny—Indictment. —— An indictment for larceny, which does not allege the property taken to belong to some other person than the defendant, is fatally defective, under California law, even after verdict. — *People v. Hauselman*, S. C. Cal., June 7, 1888; 18 Pac. Rep. 425.

54. CRIMINAL LAW— Larceny—Possession. ——A conviction of larceny is not justified, because the stolen horse was found in defendant's possession three years thereafter, though he gave no explanation of his possession when he sold it.— *Romers v. State*, Tex. Ct. App., May 2, 1888, 8 S. W. Rep. 641.

55. CRIMINAL LAW—Misdemeanor—Separation of Jury. —— A verdict in a misdemeanor case will not be set aside on appeal, because during a recess of court one of the jury, while at a distance of 100 yards from his fellows, had some conversation with an attorney, nothing improper being alleged. — *Prewitt v. State*, S. C. Miss., May 7, 1888; 4 South. Rep. 346.

56. CRIMINAL LAW—Venue— Omission. —— When the information fails to allege the venue, but the complaint does, the count will not be dismissed, but will be remanded, that a new trial may be presented. — *Orr v. State*, Tex. Ct. App., May 23, 1888; 8 S. W. Rep. 644.

57. DAMAGES — Evidence. —— Where goods were damaged by sea-water and the only evidence of the actual damage was the report of the insurer's appraiser who was dead before the trial: *Held*, that the report was inadmissible, but that the finding of the actual damage based upon common experience in such cases would be correct. — *Bradford v. Cunard, etc. Co.*, S. J. C. Mass., May 1, 1888; 16 N. E. Rep. 719.

58. DEED—Construction—Description. ——Where, by a deed the grantor conveys "all my land conveyed to me by the deed aforesaid except such portions as I have heretofore sold," the grante's title is good against all prior unrecorded deeds. — *Dow v. Whitney*, S. J. C. Mass., May 4, 1888; 16 N. E. Rep. 722.

59. DEED — Proof of Signatures of Witnesses. —— A certificate of probate of a deed that a party appeared and swore that he was familiar with the handwriting of the two witnesses, that he had frequently seen both of them, that one was dead and the other had been a non-resident of the State for many years, is defective in not testifying to the handwriting, and the registration of such deed is void.—*Anderson v. Logan*, S. C. N. Car., May 22, 1888; 6 S. E. Rep. 704.

60. DIVORCE — Alimony. —— Exceptions, in addition to an appeal, will lie from a decree that execution issue for alimony.—*Brigham v. Brigham*, S. J. C. Mass., May 10, 1888; 16 N. E. Rep. 780.

61. DIVORCE — Domicile — Jurisdiction. —— A party who resides in this State with the intention of fixing his domicile here for an indefinite time, and engages in business pursuits for a number of years, acquires a domicile which becomes his conjugal domicile; if he remains in a foreign country and brings his wife here, where she lives with him for a number of years. If she should make a visit to her native country and refuse to return, our courts can decree to the husband a separation from bed and board for abandonment.—*Larquie v. Larquie*, S. C. La., May 7, 1888; 4 South. Rep. 335.

62. DIVORCE — Evidence. —— Circumstances stated, the evidence of which was held insufficient to authorize a divorce. — *Osborne v. Osborne*, N. J. Ct. Err. and App., May 23, 1888; 14 Atl. Rep. 217.

63. DOWER—Contract—Assumpsit.—— Where plaintiff contracted with the defendant's mother to build her a house on her dower land, which she and defendant both supposed to belong to her absolutely, but in fact belonged (in reversion) to defendants, plaintiff had no right of action against defendant for work and labor.— *O'Conner v. Hurley*, S. J. C. Mass., May 7, 1888; 16 N. E. Rep. 764.

64. DRAINAGE—Statutes.—— Construction of Indiana statutes relative to drainage by public authority. Ruling as to the remonstance of land-owners interested, the filing of the report, and the notice precribed by the statute —*Goodwine v. Leak*, S. C. Ind., April 25, 1888; 16 N. E. Rep. 816.

65. EJECTMENT—Default — Adverse Possession.——A judgment by default in ejectment where no further steps are taken will not render defendants possession adverse.—*Bennett v. Morrison*, S. C. Penn., May 14, 1888; 14 Atl. Rep. 264.

66. EJECTMENT— Evidence — Deed After Suit. —— In an action to recover land, plaintiff cannot introduce in evidence in support of his title a deed made to him by a third party after the institution of the suit.—*Harrison v. McMurray*, S. C. Tex. May 22, 1888; 8 S. W. Rep. 612.

67. EMINENT DOMAIN — Compensation — Street. —— Under California law, a railroad company is not entitled to a right of way over a street, save upon compensation to the owner of the fee, allowed by a jury.— *Porter v. Pacific C. R. R.*, S. C. Cal., June 9, 1888; 18 Pac. Rep. 428.

68. EQUITY—Attachment—Injunction. —— A court of equity will not restrain by injunction the recording of an alleged fradulent conveyance because the statute provides a remedy at law.—*Freeman v. Carpenter*, S. J. C. Mass., May 4, 1888; 16 N. E. Rep. 714.

69. EQUITY — Jurisdiction —— Under the rule that equity draws to itself all matters of equitable cognizance, an action to set aside a promisory note as fraudulent need not be submitted to a jury.—*Towns v. Smith*, S. C. Ind., April 24, 1888; 16 N. E. Rep. 811.

70. EQUITY— Misrepresentations — Patent — Contract. ——Circumstances stated under which a purchase of an interest in a patent right was set aside upon the ground of misrepresentation by the vendor. — *Marsh v. Scott*, S. C. Ills., May 9, 1888; 16 N. E. Rep. 863.

71. EQUITY—Practice— Demurrer. —— Where with a demurrer a defendant files a stipulation waiving all objections to the jurisdiction on the ground that there is an adequate remedy at law, such stipulation is repugnant to the demurrer, will be disregarded, the demurrer sustained, and the bill dismissed for want of equity. — *Richards v. Lake Shore, etc. Co.*, S. C. Ills., May 9, 1888; 16 N. E. Rep. 909.

72. ESCHEAT— Information — Time. —— Under California law, a proceeding brought by the attorney general to secure, as an escheat to the school fund, the property of an intestate who has no resident heirs, is premature when brought within five years after the death of such intestate.— *People v. Roach*, S. C. Cal., May 28, 1888; 18 Pac. Rep. 407.

73. EVIDENCE—Accounting —Assignment. —— In an action against an assignee for the benefit of creditors, the answer of the assignee in another suit is competent evidence against him, as well as against the complanant. — *Asay v. Allen*, S. C. Ills., May 9, 1888; 16 N. E. Rep. 865.

74. EVIDENCE — Certificate of Copy of Land Office. ——The certificate attached by the commissioner to a certified copy of a patent was changed from the usual form by interlining the words "as said patent was originally recorded:" *Held*, that the certificate did not

render the copy incompetent. — *Stephens v. Geiser*, S. C. Tex., May 22, 1888; 8 S. W. Rep. 610.

75. EVIDENCE — Parol Evidence. —— One who has signed an order for goods is not precluded from giving evidence that defendant had agreed to advertise the goods.— *Ayer v. R. W. Bell, etc. Co.*, S. J. C. Mass., May 5, 1888; 16 N. E. Rep. 754.

76. EVIDENCE—Recitals in Deeds—Domicile. ——When domicile is a necessary element of title, it must be affirmatively proved, and a recital of domicile contained in a deed offered in evidence is not proof of such domicile. — *Dohan v. Murdock*, S. C. La., March 5, 1888; 4 South. Rep. 338.

77. EVIDENCE—Varying Writing— Ambiguity.——Under Georgia law, parol evidence is admissible to show, that a written memorandum for the delivery of a certain number of C. L. R. P. oats, meant that number of car loads of Texas west-proof oats, although such agreement is required to be in writing. — *Wilson v. Coleman*, S. C. Ga., May 25, 1888; 6 S. E. Rep. 693.

78. EXECUTION — Deed — Collateral Attack. —— A sheriff's deed under an execution issued more than seven years after the entry of the judgment, and the docket showing the issue of such execution, are admissible to show title, though no execution was issued within a year after the entry of judgment. An execution on a dormant judgment in only voidable.—*Maverick v. Flores*, S. C. Tex., June 1, 1888; 8 S. W. Rep. 636.

79. EXECUTION—Issue—Leave of Court.——If five years have elapsed after the entry of judgment without the issue of an execution, no execution can issue thereafter without leave of court, and the party must file his motion, properly verified, and cause a summons to be served on the judgment debtor. — *Pursel v. Deal*, S. C. Oreg., May 14, 1888; 18 Pac. Rep. 461.

80. EXECUTION— Sale of Realty — Deed. —— When a creditor, who has obtained a deed from his debtor to secure his debt, follows the statute, files a deed reconveying the land to him, sues and obtains judgment on his claim, has the land levied on, and buys it and obtains the sheriff's deed, his title is complete and indefeasible.—*Crawford v. Pritchard*, S. C. Ga., June 1, 1888; 6 S. E. Rep. 689.

81. EXECUTORS—Qualification—Effect. ——The qualification and returns of inventory by one of two executors of a will, made under Rev. St. Tex. arts. 1942, 1943, is sufficient to withdraw the estate from administration by the court, and subject property in the hands of such executor to levy and sale on execution.—*Roberts v. Connelle*, S. C. Tex., May 29, 1888; 8 S. W. Rep. 626.

82. EXECUTORS—Sale of Realty — Tutors — Regularity. —— Neither a tutor administering a succession nor an administrator, can ask and obtain the sale of more property than is necessary to pay the debts. When the sale of succession property is not justified by the face of the papers, it can be successfully resisted by an adjudicatee refusing compliance with his bid on property offered for sale.—*Succession of Dumstree*, S. C. La., May 7, 1888; 4 South. Rep. 328.

83. EXECUTORS—Sale under Will — Posthumous Child. ——Executors may sell under the power contained in a will, but such sale does not affect the interest of a posthumous child, not named or provided for in the will.— *Northrop v. Marquam*, S. C. Oreg., April 14, 1888; 18 Pac. Rep. 449.

84. EXECUTORS AND ADMINISTRATORS — Settlement — Reopening.——Under the statute of Indiana, the settlement of an executor may, for three years after its date, be reopened at the instance of a person interested in the estate, who had not attended the settlement nor been summoned to do so. — *Dillman v. Barber*, S. C. Ind., May 8, 1888; 16 N. E. Rep. 825.

85. EXECUTOR AND ADMINISTRATOR — Statute — Jurisdiction.——Where the statute provides that the jurisdiction of probate courts dependant upon residence, etc., shall not be contested except upon appeal, it is not competent upon petition to deny the validity of the appointment of an administrator on the ground of his non-residence.—*Cummings v. Hodgeon*, S. J. C. Mass., May 4, 1888; 16 N. E. Rep. 732.

86. EXTRADITION—Warrant— Sufficiency. —— A warrant, issued by a State executive for the apprehension and extradition of a fugitive from justice, is sufficient, when it recites without setting out in full the affidavit on which it is based; it need not show that the offense charged is a crime by the law of the demanding State.— *Ex parte Stanley*, Tex. Ct. App., May 2, 1888; 8 S. W. Rep. 645.

87. FISHERIES — Oyster-beds. —— Circumstances stated under which a person engaged in fishing for clams was held not liable in damages for disturbing the oyster-bed of another which was planted upon the natural bed. —*Brown v. De Groff*, N. J. Ct. Err. and App., May 24, 1888; 14 Atl. Rep. 219.

89. FORCIBLE ENTRY AND DETAINER—Possession.—— One who could not agree with the owner of an unfinished livery stable, cannot acquire such possession against a lessee from the owner, who goes into possession as to maintain an action for forcible entry and detainer by hitching horses in the unfinished stable.— *Blake v. McCroy*, S. C. Miss., April 30, 1888; 4 South. Rep. 339.

89. FRAUD—Conspiracy—Statute of Frauds.——Where H, in order to defraud A, falsely represented to him that T was solvent and induced him to sell, on credit, property to T which he transferred to H: *Held*, that the statute of frauds did not apply, that H and T were guilty of a conspiracy to defraud, and were both liable to A for the purchase money.— *Hodgins v. Bryant*, S. C. Ind., April 24, 1888; 15 N. E. Rep. 815.

90. FRAUDULENT CONVEYANCES—Change of Possession. ——A purchased horses from B and removed them to another pasture, but soon returned them. B afterwards took the horses from the pasture and contracted with C for their pasturage, and sold some of them, and had sufficient control of them to have sold all of them: *Held*, that under California law the sale to A was not valid as against the creditors of B. — *Ruddle v. Givens*, S. C. Cal., June 7, 1888; 18 Pac. Rep. 427.

91. FRAUDULENT CONVEYANCE —Judgment by Confession—Conspiracy.——Where a conspiracy to commit a fraud has been established, the declarations of one conspirator are competent against his co-conspirators, but where the principal debtor has confessed judgment his declarations are not evidence against the others.— *Farren v. Mintzer*, S. C. Penn., May 7, 1888; 14 Atl. Rep. 267.

92. FRAUDS, STATUTE OF — Debt of Another. —— A verbal acceptance of a bill of exchange is not within the statute of frauds. — *Newmann v. Shroeder*, S. C. Tex., May 29, 1888; 8 S. W. Rep. 632.

93. HIGHWAY—Injunction.——The opening of a highway will not be restrained by injunction unless the proceedings under which it was located were so defective that they did not show how parties interested would be affected by the highway.— *McDonald v. Payne*, S. C. Ind., April 17, 1838; 16 N. E. Rep. 795.

94. HIGHWAY—Location. —— What is necessary and sufficient for the location of a highway under the laws of Indiana.— *Wells v. Rhodes*, S. C. Ind., May 9, 1888; 16 N. E. Rep. 830.

95. HIGHWAYS — Vacation. —— Construction of Indiana statutes relative to highways, their location and the procedure proper for the vacation of highways. — *Hughes v. Beggs*, S. C. Ind., May 8, 1888; 16 N. E. Rep. 817.

96. HOMESTEAD—Abandonment—Levy.——A went to Arizonia, bought property there and located, intending to remain. His wife and children continued to live on the homestead in Texas, intending to join him as soon as they could get the means by selling the homestead. The homestead was levied on for his debts: *Held*, that the homestead had not been abandoned, and the levy and sale were invalid.— *McDaniell v. Ragsdale*, S. C. Tex., May 29, 1888; 8 S. W. Rep. 625.

97. HOMESTEAD—Business Premises.——Under Texas law, one who resides on property which he does not

own, may claim as a homestead a lot upon which are erected a gin and mill buildings, for the exercise of his business and calling. — *Low v. Tandy*, S. C. Tex., May 25, 1888; 8 S. W. Rep. 620.

98. HOMESTEAD—Value—Description.——In this case the declaration of the value of the homestead, and the description of the premises were held to be sufficient, under California law. — *Schuyler v. Broughton*, S. C. Cal., June 9, 1888; 18 Pac. Rep. 436.

99. HUSBAND AND WIFE—Community Property—Damages for Mental Suffering.——Where by fault of a telegraph company a dispatch concerning the sickness of her son was not delivered in time to a married woman, a recovery may be had by her husband for the mental suffering endured by her.— *Loper v. Western U. T. Co.*, S. C. Tex. May 11, 1888; 8 S. W. Rep. 600.

100. HUSBAND AND WIFE—Pleading.——A wife joining her husband in a mortgage on his land is not a surety. Where a paragraph implies that a party owned land when it was mortgaged, it will not be held insufficient because it does not directly aver that fact. — *Tennison v. Tennison*, S. C. Ind., May 8, 1888; 16 N. E. Rep. 818.

101. HUSBAND AND WIFE — Separate Property. —— A deed conveying land to a single woman sufficiently shows the land to be her separate estate though followed after her marriage by a second deed from the grantor to her in her married name and upon an expressed money consideration. — *Maguire De Fremeny*, S. C. Cal., June 6, 1888; 18 Pac. Rep. 410.

102. INDICTMENT — Criminal Practice — Grand Jury — Evidence.——The evidence of a grand juror cannot be admitted to impeach the validity and regularity of an indictment.—*Zeigler v. Commonwealth*, S. C. C. Penn., May 14, 1888; 14 Atl. Rep. 237.

103. INJUNCTION—Vacating—Appearance.——It is not error to vacate a restraining order, when the party who obtained it more than twenty days before fails to appear at the hearing at chambers, which had been fixed by consent, no cause being shown why it should not be set aside.— *Coward v. Chastain*, S. C. N. Car., May 22, 1888; 6 S. E. Rep. 703.

104. INSOLVENCY — Contract — Consideration — Guaranty. —— Where a contract was made between two creditors of an insolvent estate by which one guaranteed to the other that ten per cent. of his claim should be paid by the estate, the consideration of that contract being that the latter creditor should vote for a certain person as assignee of the estate: *Held*, that such contract was illegal and void and no recovery could be had thereon.— *Easton v. Littlefield*, S. J. C. Mass., May 7, 1888; 16 N. E. Rep. 771.

105. INSOLVENT LAWS — Assignee — Alabama Claim — Statute. —— Under the insolvent statutes of Massachusetts choses in action of an insolvent passed to his assignee, and an Alabama claim forms no exceptions to the rule. — *Goreley v. Butler, Chrisman v. State Ins. Co.*, S. J. C. Mass., May 4, 1888; 16 N. E. Rep. 734.

106. INSURANCE—Insurable Interest. —— The insured must have an insurable interest at the time of the insurance and ot the loss.—*Chrisman v. State Ins. Co.*, S. C. Oreg., May 8, 1888; 18 Pac. Rep. 466.

107. INSURANCE—Proof of Loss—Conditions.——When a policy of insurance provides, that the extent of loss shall upon the demand of either parties be appraised by arbitrators, and that nothing shall be paid till such appraisement is furnished, such appraisement when demanded is a condition precedent to a right of action by the assured. — *Scottish U. & N. I. Co. v. Clancy*, S. C. Tex., May 29, 1888; 8 S. W. Rep. 630.

108. INSURANCE—Warranty—Application.——When it is agreed in the application, that the insurance shall be void, unless the answers in the application are true, such answers are express warranties, and if they are untrue no recovery can be had on the policy. Representations must be true only so far as they are material to the risk. — *Chrisman v. State I. Co.*, S. C. Oreg., May 8, 1888; 18 Pac. Rep. 466.

109. INTOXICATING LIQUORS— Indictment. —— An indictment charging that defendant sold vinous and intoxicating liquors without a license is sufficient, under Alabama laws, and need not aver that defendant does not come under one of the exceptions. — *Bogan v. State*, S. C. Ala., May 31, 1888; 4 South. Rep. 355.

110. INTOXICATING LIQUORS— Local Option Law Adoption. —— A conviction for violating the local option law of Mississippi cannot be sustained when there is no proof that the act has been put in operation in the county where the offense was committed. — *Bryant v. State*, S. C. Miss., May 7, 1888; 4 South. Rep. 343.

111. INTOXICATING LIQUORS— Practice—Statute.——A complaint that defendant kept intoxicating liquors for sale instead of alleging that he kept a place for the sale of intoxicating liquors, is defective, but the objection cannot be made after the case has gone out of the justices court by appeal. — *Commonwealth v. Purdy*, S. J. C. Mass., May 4, 1888; 16 N. E. Rep. 745.

112. INTOXICATING LIQUORS— Sale by Druggist — Good Faith. —— In a prosecution against a druggist, under the Mississippi local option law, the defendant is entitled to have the question of his good faith in selling the alcohol submitted to the jury, the purchaser having represented that he wanted it for medicine. — *Brooks v. State*, S. C. Miss., May 7, 1888; 4 South. Rep. 343.

113. INTOXICATING LIQUORS — Sales to Minors — Evidence.——To prove that the purchaser of liquor was a minor, a witness cannot testify, that it was reasonably apparent to the observation of a prudent person that such person was not of age. — *Walker v. State*, Tex. Ct. App., May 23, 1888; 8 S. W. Rep. 644.

114. JUDGE—Special—Record. ——Under Virgina law, when no order is entered of record that the regular judge of the county court, who is present, is so situated as to render it improper for him to sit in the trial of a cause, a judgment therein before a special judge is void. — *Gresham v. Ewell*, S. C. App. Va., June 6, 1888; 6 S. E. Rep. 700.

115. JUDGMENT—Confession.——When a judgment by confession purports to have been entered in open court in term-time, it cannot, in the absence of fraud, be shown that the contrary is the fact. — *Weigley v. Matson*, S. C. Ills., May 9, 1888; 16 N. E. Rep. 881.

116. JUDGMENT—Deed—Lien. —— Under Texas law, a judgment is not a lien against a deed recorded before the judgment is indexed.—*Nye v. Moody*, S. C. Tex., April 10, 1888; 8 S. W. Rep. 606.

117. JUDGMENT — Default — Jury Trial. —— Where a judgment in an action for unliquidated damages was taken by default, and the record failed to show that defendant demanded a jury and deposited the jury fee, a jury was properly refused, and the court properly assessed the damages. — *Bumpas v. Morrison*, S. C. Tex., May 25, 1888; 8 S. W. Rep. 506.

118. JUDGMENT—Res Adjudicata. —— A sued B for land sold to B by C. B had C made a party defendant, and alleged that C had fraudulently altered the deed to B, so as to make it contain only a special warranty. The court adjudged that C go hence without day and recover his costs of B: *Held*, that in a subsequent suit by B against C, alleging the same fraud, the matter was *res adjudicata*.—*Monks v. McGrady*, S. C. Tex., May 22, 1888; 8 S. W. Rep. 617.

119. JUDGMENT — Satisfaction—Compromise.——Circumstances stated under which a compromise made by a judgment creditor of a demand against him for redemption of land bought at execution sale was held to be good.—*Pfaffenberger v. Platter*, S. C. Ind., May 9, 1888; 16 N. E. Rep. 835.

120. JUDGMENT—Vacation—Jurisdiction. ——A judgment rendered on a summons by publication, when no affidavit was made, nor an order of court directing a summons by publication, is void, and will be vacated.—*People v. Pearson*, S. C. Cal., June 5, 1888; 18 Pac. Rep. 424.

121. JUSTICE OF THE PEACE—Pleading—Appeal.——A judgment rendered in the justice's court cannot upon appeal be impeached on the ground that the complaint

did not state a sufficient cause of action.—*Anderson v. Lipse*, S. C. Ind., May 9, 1888; 16 N. E. Rep. 833.

122. LANDLORD AND TENANT—Tenancy at Will—Burden of Proof.——Where a lessee of land seeks by summary proceeding to evict tenants at will, holding under the owner, he is not required to show that the owner's title was such that he could lease the property. The burden is upon the defendant to show, if they can, the contrary.—*Streeter v. Ilsley*, S. J. C. Mass., May 7, 1888; 16 N. E. Rep. 776.

123. LEGACY—Payment—Securities.——Where a legacy of money for life is given, it is competent for the legatee, with the assent of the residuary legatee, to receive from the executor, in lieu of money, bank stock at market value. In such case the title of the bank stock vests in the legatee, and at his death his estate is liable to the residuary legatee for the amount of the legacy.—*Chase v. Burritt*, S. C. Err. and App. Conn., June, 1888; 14 Atl. Rep .212.

124. LIMITATIONS—Abatement of Action—Corporation. ——A sued an insurance company for the premiums paid on a policy on account of its fraudulent representations. While the suit was pending the corporation was dissolved, in 1879. In 1885, A sued the representatives of the dissolved corporation: *Held*, that the suit was barred.—*Life Assn. v. Goode*, S. C. Tex., June 1, 1888; 8 S. W. Rep. 639.

125. LIMITATIONS—Acknowledgment of Debt. —— A conditional promise in writing to pay, if ever the promisor is able, coupled with proof of such ability subsequent to the promise, is sufficient to take a case out of the Texas law limiting actions for debt not evidenced by a contract in writing to two years, even if such ability is not a continuing one.—*Lange v. Carothers*, S. C. Tex., May 15, 1888; 8 S. W. Rep. 604.

126. LIMITATIONS—Action.——Where, by agreement, A, upon payment of a certain sum, was to have one-third of a tract of land held by B, and the land was sold with the knowledge of A, he has no right of action except for a money demand, and that will be barred, in Illinois, in five years.—*Horne v. Ingraham*, S. C. Ill., May 9, 1888; 16 N. E. Rep. 868.

127. LIMITATIONS — Adverse Possession. —— Where two persons claim under conflicting surveys, the claimant under the junior grant must show actual possession of a portion of the strip in controversy to set up a title by the plea of limitation, and the mere herding of sheep thereon from time to time is not such occupancy.—*Mason v. Stapper*, S. C. Tex., May 25, 1888; 8 S. W. Rep. 598.

128. LIMITATIONS—Adverse Possession—Vendor.—— One who conveys land to another by deed and continues to live on it, cultivating it and paying taxes thereon, cannot avail himself of the statute of limitations to defeat the title of his vendee.—*Voight v. Mackle*, S. C. Tex., May 29, 1888; 8 S. W. Rep. 623.

129. LIMITATIONS—Dismissal of Action—Renewal.——A brought an action and afterwards dismissed it. After the statutory period had elapsed, and within six months and four days after the dismissal, he renewed the action: *Held* that, under Georgia law, the action was barred.—*Bagley v. Stephens*, S. C. Ga., June 1, 1888; 6 S. E. Rep. 695.

130. LIMITATIONS—Suit—Dismissal —— A plaintiff in an action to recover land, died September, 1878, and the case was dismissed December, 1879. Before his death he conveyed the land to his son. No application was ever made by his representatives nor by his son to set aside the order of dismissal: *Held*, that as the action was not prosecuted to effect, it did not stop the running of the statute of limitations.—*Harrison v. McMurray*, S. C. Tex., May 22, 1888; 8 S. W. Rep. 612.

131. MARINE TORTS—Swell of Steamer.——The duty of a passing steamer to guard against the injurious effects of her swell and suction upon the smaller craft in rivers and harbors has often been enforced in courts of admiralty.—*The New York*, U. S. D. C. (N. Y.), March 24, 1888; 34 Fed. Rep. 757.

132. MASTER AND SERVANT — Discharge by Death of Master.——Six months' continuation of services of a servant employed by the deceased, after the appointment of an administrator, in the absence of special circumstances shown, is more than a reasonable continuance of such service, under Civil Code Cal. § 1908, providing for payment therefor.—*Weithoff v. Murray*, S. C. Cal., June 9, 1887; 18 Pac. Rep. 435.

133. MASTER AND SERVANT—Risks of Employment.—— If a servant be aware that proper precautions have not been taken for his safety, and still continues the service, notwithstanding the risk, he will be considered as having assumed the responsibility of his own security. —*Smith v. Sellers*, S. C. La., May 7, 1888; 4 South. Rep. 333.

134. MECHANIC'S LIEN — Specifications — Filing.—— Under a contract to erect a building conformable to the drawings and specifications made, such drawings and specifications should be filed in the county recorder's office, under the California lien law.—*Holland v. Wilson*, S. C. Cal., June 7, 1888; 18 Pac. Rep. 412.

135. MINES—Grant—Right to Occupy Surface.——An express grant of all the minerals and mineral rights in a tract of land is a grant of a right to open and work the mines and to occupy so much of the surface as may be necessary therefor, and the extent of such occupation is a question for the jury.—*Williams v. Gibson*, S. C. Ala., May 30, 1888; 4 South. Rep. 350.

136. MINES—Possession — Recording Certificate.—— Where A is in actual possession of a mining claim and engaged in developing it, claiming to be the owner, B cannot initiate a title thereto by a survey and the recording of a location certificate.—*Omar v. Soper*, S. C. Colo., May 19, 1888; 18 Pac. Rep. 443.

137. MINES—Posting Notice.—— A notice of discovery posted by the discoverers of a lode of mineral at the point of discovery, containing a specification of the extent of the claim, although no such specification is required by statute, will protect the full extent of the claim against an overlapping claim during the period allowed by statute for sinking a discovery shaft, even though the boundaries have not been marked.—*Omar v. Soper*, S. C. Colo., May 19, 1888; 18 Pac. Rep. 443.

138. MUNICIPAL CORPORATION—Buildings—Fire Limits. ——The ordinance of San Francisco relative to the construction of buildings within the city fire limits is constitutional.—*McCloskey v. Kreling*, S. C. Cal., June 9, 1888; 18 Pac. Rep. 433.

139. MUNICIPAL CORPORATION—Public Improvements —Statute.——Construction of Indiana statutes relative to the powers and duties of municipal corporations to make public improvements. Powers of trustees of towns to require lot owners to make sidewalks.—*Wiles v. Hoss*, S. C. Ind., April 18, 1888; 16 N. E. Rep. 800.

140. MUNICIPAL CORPORATION—Statute.——Construction of Indiana statutes relative to the collection of assessments made by municipal corporations and the requisites of the affidavits required of contractors before they can collect such assessments.—*Clements v. Lee*, S. C. Ind., April 18, 1888; 16 N. E. Rep. 799.

141. NEGLIGENCE—Contributory—Railroads. —— Under the facts it was held that the proximate cause of plaintiff's injury was his own negligence, and that he could not recover, though the defendant had violated the city ordinance and was guilty of negligence in running its train.—*Ryall v. Central P. R. Co.*, S. C. Cal., June 9, 1888; 18 Pac. Rep. 430.

142. NEGLIGENCE—Contributory Negligence.——Circumstances stated under which a railroad company is not responsible for an accident caused by the misplacement of "handhold" on the top of the car.—*Fair v. Pennsylvania, etc. Co*, S. C. Penn., May 14, 1888; 14 Atl. Rep. 236.

143. NEGOTIABLE INSTRUMENT—Accommodation Paper —Partnership.——Where one partner, at the request of another partner's father, signs a firm note for his partner's individual use, and that the note afterwards became the property of the father: *Held*, that the partners so signing were liable thereon. — *Lockwood v. Twitchell*, S. J. C. Mass., May 4, 1888; 16 N. E. Rep. 728.

144. PARTNERSHIP — Dissolution. —— Circumstances stated under which it was held that upon the dissolution of a partnership, one partner had not, under the agreement, a right to quarry stone on the land of the other partner.—*Wagoner v. Warne*, N. J. Ct. Chan., May 10, 1888; 14 Atl. Rep. 215.

145. PARTNERSHIP—Limited Partnership — Mortgage—Statute.—Construction of Pennsylvania statute regulating limited partnerships. Circumstances stated under which the members of such a partnership have no power to mortgage the partnership property, such mortgage being held *ultra virgs.—Appeal of Fisher*, S. C. Penn., May 7, 1888; 14 Atl. Rep. 225.

146. PARTNERSHIP—Power of Partner — Contract.—— A partnership negotiated a loan for B, under which B was required to insure a certain house. B gave one of the partners the money therefor, who agreed to obtain the insurance but failed to do so. After loss and a suit for damages against the partnership, its liability cannot be avoided on the ground that the act of the partner was outside of partnership functions without explanatory proof to that effect. — *Collier v. McCall*, S. C. Ala., May 31, 1888; 4 South. Rep. 367.

147. PATENTS—Infringement—Parties.—— The owner of one patent and exclusive license of another, joined with his licensor as plaintiff, may enjoin an apparatus infringing on both patents. — *Huber v. Myers S. Depot*, U. S. C. C. (N. Y.), April 16, 1888; 34 Fed. Rep. 752.

148. PATENTS — Wheelbarrows. —— Patent 349,681 for an improvement in metal wheelbarrows cannot be so extended as to include all detachable clamps which encircle the handles and clamp them to the cross bars.—*Blaum v. National B. & T. Co.*, U. S. C. C. (N. Y.), April 24, 1888; 34 Fed. Rep. 755.

149. PAYMENT — Promissory Note. —— One who accepts the note of a third party and credits it as a payment on an open account is not thereby precluded from suing upon the account. — *Cheltenham, etc. Co. v. Gates, etc. Co.*, S. C. Ills., May 9, 1888; 16 N. E. Rep. 923.

150. PLEADINGS— Amendment —Trespass to Try Title. —— In trespass to try title, defendant answered that the deed under which plaintiff claimed title was only a mortgage: *Held*, that plaintiff may amend so as to demand foreclosure in case his deed should be declared a mortgage. — *Nye v. Gribble*, S. C. Tex., April 13, 1888; 8 S. W. Rep. 608.

151. PLEADING—Contracts — Counties. —— A sued B county for work done under a contract made by it with C, alleging that by mistake the clerk omitted from the order the part of the agreement, which allowed C to employ a substitute: *Held*, that the allegation was not sufficient to allow a conviction of the order on the ground of mistake, and that A should have seen that the order was correct before he began the work. — *Gano v. Palo Prios Co.*, S. C. Tex., June 1, 1888; 8 S. W. Rep. 634.

152. PLEADING — Promise to Pay Firm Debt. —— A sued B, his former partner, alleging that B had agreed to pay the firm debts, but had failed to do so. There was no allegation that he had agreed to pay in a particular time, or that a reasonable time had elapsed: *Held*, that the action was properly dismissed. — *Geise v. Ragan*, S. C. Ga., June 1, 1888; 6 S. E. Rep. 697.

153. PLEADING—Statute of Frauds—Realty. —— In an action to enforce a trust in land, where it appears on the face of the complaint that the alleged trust rests on a parol agreement to recovery, the defense of the statute of frauds may be taken advantage of on demurrer. — *Barr v. O'Donnell*, S. C. Cal., June 9, 1888; 18 Pac. Rep. 429.

154. PLEDGE—Evidence. —— An absolute transfer of stock will not be declared a pledge upon the single evidence of the complainant contradicted by the defendant.— *Travers v. Leopold*, S. C. Ills., May 9, 1888; 16 N. E. Rep. 902.

155. PLEDGE — Stock. —— A stockholder who has pledged his stock for the payment of a note and has failed for thirty days after the maturity of the note to pay it, is not entitled to notice of the time and place of the sale of the stock.— *McDowell v. Chicago, etc. Co.*, S. C Ills., May 9, 1888; 16 N. E. Rep. 854.

156. PRACTICE — Bill of Exceptions. —— A judgment will not be reversed on a question of evidence if it does not appear by the record that all the evidence was in the bill of exceptions.— *Moore v. State*, S. C. Ind., May 8, 1888; 16 N. E. Rep. 836.

157. PRACTICE—Continuance — Diligence. —— On application for a continuance for want of testimony, which does not show when the subpœnas for the absent witnesses were placed in the hands of an officer for service, or when they were served, is properly refused under Texas laws. — *Brown v. Abilene N. Bank*, S. C. Tex., May 25, 1888; 8 S. W. Rep. 599.

158. PRACTICE— Dismissal — Arbitration. —— A submission of a pending action to arbitration, which does not stipulate that it shall be entered as an order of court, operates as a discontinuance of the action. — *Draghicevich v. Valicevich*, S. C. Cal., June 1, 1888; 18 Pac. Rep. 406.

159. PRACTICE — New Trial — Sufficiency of Evidence. —— The assignee of a mortgage sued to foreclose it. The mortgagor pleaded payment before assignment and so testified. The assignee introduced a postal-card to him from the mortgagor admitting that he was still liable for the debt: *Held*, that the trial court properly refused defendant's motion for a new trial. — *Amos v. Flournoy*, S. C. Ga., June 1, 1888; 6 S. E. Rep. 696.

160. PRACTICE--Presumption—Dismissal. —— Where upon appeal it appears that a petition for condemnation of land was dismissed by the trial court, and no bill of exceptions is found in the record, it will be presumed that the petition was not sustained by sufficient evidence. — *City of Chicago v. Porter*, S. C. Ills., May 9, 1888; 16 N. E. Rep. 854.

161. PREFERENCES—Assignment—Judgment—Confession. —— A warrant of attorney to confess judgment, made in good faith, is valid, although executed a short time before an assignment, and so is a judgment upon such warrant is rendered before the assignment is executed.—*Field v. Geohegan*, S. C. Ills., May 9, 1888; 16 N. E. Rep. 912.

162. PRINCIPAL AND AGENT — Evidence —Question for Jury. —— Circumstances stated under which it was held to be a question for the jury, whether an agent was responsible for failure to collect the money for shingles sold as No 2, the evidence being conflicting as to whether they were No 2 or not. — *Grenninger v. Grephart*, S. C. Penn., May 14, 1888; 14 Atl. Rep. 252.

163. PUBLIC LANDS—Titles from States — Prior Grants. ——Where congress donated lands for an agricultural college, which the State sold and the vendee obtained a patent, such vendee was decided to hold the patent for the benefit of one, who has purchased from the State, and was in possession, under the act of congress of July 13, 1866. — *McNee v. Donahue*, S. C. Cal., June 9, 1888; 18 Pac. Rep. 438.

164. RAILROADS — Dangerous Premises — Exemplary Damages. —— When a railroad has erected an office and platform at a station for the transaction of its business with the public, they should be safe and should be lighted at a proper time before the arrival and departure of trains. Exemplary damages can be recovered without being pleaded.—*Alabama, etc. R. R. v. Arnold*, S. C. Ala., May 30, 1888; 4 South. Rep. 359.

165. RAILROAD CROSSING — Prescription. — Circumstances stated under which it was held that a party had acquired by prescription a right to a railroad crossing. — *Fitchburg, etc. Co. v. Frost*, S. J. C. Mass., May 7, 1888; 16 N. E. Rep. 773.

166. RAPE—Alibi.—Circumstances stated under which upon a charge of rape an *alibi* was held not to be established.— *Ackerson v. People*, S. C. Ills., May 9, 1888: 16 N. E. Rep. 847.

167. RECORDS—Destruction— Restoration.—— Under Mississippi law, the remedy of a plaintiff seeking to restore the record in a former action at law, which has been destroyed by fire, is by a proceeding in the court

by which it was pending, though it has a different judge. — *Welch v. Smith*, S. C. Miss., April 30, 1888; 4 South. Rep. 340.

168. RECORD—Index.— Construction of Pennsylvania statutes relative to the preservation of records, and making of new indexes of the same. The court has power to intrust the making of the indexes to other persons than those holding the offices. — *McCommon v. Spong*, S. C. Penn., May 14, 1888; 14 Atl. Rep. 260.

169. RELIGIOUS SOCIETIES—Mandamus—Mandate. — A writ of *mandamus* or mandate will not lie to compel a religious society or corporation to fulfill an obligation it has incurred, to allow ministers of other "orthodox" denominations to officiate in its church building.—*State v. Trustees of Salem Church*, S. C. Ind., April 24, 1888; 16 N. E. Rep. 808.

170. RIPARIAN RIGHTS—Low Water Marks—Statutes.— Under Massachusetts statute, the owners of adjoining lands own flats to low water mark and to the thread of fresh water streams which flow through them.—*Servall, etc. Co. v. Boston, etc. Co.*, S. J. C. Mass., May 5, 1888; 16 N. E. Rep. 782.

171. REPLEVIN— Statute — Evidence. — Where in a replevin case for five hogs, the constable's return showed that he had taken four of them, but failed to show any thing about the fifth, the evidence was confined, under the statutes of Indiana, to the four hogs so seized by the officer.—*Burket v. Pheister*, S. C. Ind., May 12, 1888; 16 N. E. Rep. 811.

172. REWARD—Bribery—County Court. — A county court made an order, that a reward of $250 be offered for information which might lead to the conviction of any one guilty of bribery at a coming election: *Held*, that the county court had no such power. — *Mountain v. Multnomah County*, S. C. Oreg., May 8, 1888; 18 Pac. Rep. 464.

173. SALE — Vendor and Vendee. — Circumstances stated under which it was properly left to the jury to say whether upon the alleged sale of a horse there had been a sufficient change of possession. — *McElry v. McElroy*, S. C. Penn., May 14, 1888; 14 Atl. Rep. 242.

174. SCIRE FACIAS — Renewal of Judgment— Heirs.— Upon *scire facias* to revive a judgment against the heirs of the judgment debtor, it is error to render judgment against them without proof that they inherited assests from their ancestor. — *Schmidtke v. Miller*, S. C. Tex., June 1, 1888; 8 S. W. Rep. 638.

175. SEAL—Signature. — Where there are more signatures than seals on an instrument, any two or more of the signers may adopt the same seal, and this although the names of the signers do not appear in the body of the instrument. —*Citizens, etc. v. Cummings*, S. C. Ohio, May 1, 1888; 16 N. E. Rep. 841.

176. SHIPPING—Master and Servant —Defective Appliance. — When an employee of a stevedore on a ship unloading it is injured by the breakage of a rope belonging to a sling which the ship furnished, the ship is liable, though the injury was contributed to by the negligence of a fellow employee in not notifying him that a load was being lowered. — *The Phœnix*, U. S. D. C. (S. Car.), April 5, 1888; 34 Fed. Rep. 760.

177. SPECIFIC PERFORMANCE— Indefiniteness.—The written contract was held to be too indefinite to decree specific performance thereof. — *Burnett v. Kullak*, S. C. Cal., June 11, 1888; 18 Pac. Rep. 401.

178. STOCK — Killing — Railroads — Negligence. — When mules are in a field in a depression, from which access to the railroad track is not easy, it is not the duty of the engineer to stop his train so soon as he sees the mules; but when he sees that the mules indicate a purpose to go on the track it is his duty to stop. — *Yazoo & M. R. R. v. Brumfield*, S. C. Miss., April 23, 1888; 4 South. Rep. 341.

179. STATUTES—Repeal—Police Courts.—The law of 1885, providing for police courts in cities of certain size, is constitutional, and repealed by implication the act of 1866, establishing a police court in the city of Oakland.—*People v. Henshaw*, S. C. Cal., June 7, 1888; 18 Pac. Rep. 413.

180. SURETY—Subrogation.—Where a surety pays a judgment against him and his principal, he is entitled to be subrogated to the rights of the creditor. — *Appeal of McCormick*. S. C. Penn., May 14, 1888; 14 Atl. Rep. 257.

181. TAXATION—Mortgage — Rights of Mortgagee.— Property adjudicated at a sheriff's sale for the taxes to the mortgagee, and subsequently retroceded, with the formal agreement that matters will stand in the condition in which they were previous to the adjudication, can be proceeded against *via executiva* by the creditor to foreclose the mortgage as though the tax-sale and retrocession had never taken place, — *Beer v. Haas*, S. C. La., April 16, 1888; 4 South. Rep. 326.

182. TAXATION—Taxable Property—Equity.—A corporation owning the waters of a pond but not the land beneath it is liable for the taxes upon the property, and a bill cannot be maintained to relieve such corporation against a tax-title.—*Flax-pond, etc. Co. v. City of Lynn*, S. J. C. Mass.; May 5, 1888; 16 N. E. Rep. 742.

183. TENANT IN COMMON— Adverse Possession. — A tenant in common cannot claim the benefit of adverse possession against his co-tenant by virtue of a deed from the widow of their common ancestor, when such deed was not recorded and the co-tenant had no notice of it.—*Hignite v. Hignite*, S. C. Miss., May 7, 1888; 4 South. Rep. 345.

184. TENANT IN COMMON—Adverse Possession—Limitation.—One tenant in common may make his possession adverse, but the statute of limitations only begins to run from the time when his co-tenant has notice of such adverse possession.—*Northrop v. Marquam*, S. C. Oreg., April 14, 1888; 18 Pac. Rep. 449.

185. TRESPASS — Evidence — Question for Jury. — Where one party testified that he and his neighbor had agreed that each should watch his own cattle to prevent them from trespassing on the lands of the other, this agreement being denied by the other party, the question whether it was made as stated was properly submitted to the jury.—*Robinson v. Fetterman*, S. C. Penn., May 14, 1888; 14 Atl. Rep. 245.

186. TRESPASS TO TRY TITLE— Deed after Entry. — In trespass to try title a deed to plaintiff, bearing date after the entry alleged in the petition but before the filing of the suit, is admissible in evidence. — *Jenkins v. Adams*, S. C. Tex., May 25, 1888; 8 S. W. Rep. 603.

187. TRUST—Discretion. — Where a debtor conveys property to a trustee to pay his debts, giving the trustee absolute discretion as to the sale of the property and the settlement with the creditors, a court of equity cannot interfere with such discretion by ordering a distribution *pro rata* of the proceeds of the sale. — *National, etc. v. Sutton*, S. J. C. Mass., May 7, 1888; 16 N. E. Rep. 759.

188. TRUST—Resulting Trust—Evidence. — Circumstances stated under which it was held, that although a father had advanced to his son money to buy land and to build a house thereon, the evidence failed to establish a resulting trust in his favor. — *Appeal of Mayer*, S. C. Penn., May 14, 1888; 14 Atl. Rep. 253.

189. USURY.—Where a note bearing interest at the rate of ten per cent., payable annually, was renewed, the charging, in the new note, of interest on the accrued interest, from the time it became due to the date of removal, at six per cent. per annum, does not render the transaction usurious.—*Gilmore v. Bissell*, S. C. Ills., May 9, 1888; 16 N. E. Rep. 925.

190. USURY—Contract.—Where a trust deed of land is given to secure usurious loan and the creditor buys in the land, and afterwards upon another arrangement the debtor takes back part of the land and gives his note for the amount due to the creditor, that note is not affected by the usury of the former transaction. — *Ryan v. Newcomb*, S. C. Ills., May 9, 1888; 16 N. E. Rep. 878.

191. VENDOR—Lien—Failure of Title. — A with full knowledge of the facts took a defective tax-title, and being aware of the danger of loss accepted a deed from

B with special warranty, B having refused to give a general warranty: *Held*, in a suit by B to enforce his vendor's lien, that A could not avoid payment of the purchase money on the ground of failure of title. — *McIntyre v. DeLong*, S. C. Tex., May 29, 1888; 8 S. W. Rep. 622.

192. WARRANTY— Description. —— One who conveys land by warranty deed making one of the lines the center of a wall, is liable for breach of warranty if the wall is altogether the property of another person.— *Cecconi v. Rodden*, S. J. C. Mass., May 7, 1888; 16 N. E. Rep. 749.

193. WAYS—Obstruction—Injunction. —— The owner of a lot having a way appurtenant may, by a mandatory injunction, compel the removal of a stairway which obstructs such way.—*Stallard v. Cushing*, S. C. Cal., June 9, 1888; 18 Pac. Rep. 427.

194. WILL—Construction. —— Where a testator provided by his will that his land should be divided between his three sons, after they became of age, and that his widow should be entitled to a support out of the rents and profits until her death or remarriage: *Held*, that the widow's rights were not dependent upon the sons becoming of age nor affected by any partition of the lands made among them. — *Commons v. Commons*, S. C. Ind., April 25, 1888; 16 N. E. Rep. 820.

195. WILL—Construction. —— A testator bequeathed $100 to each of his nephews: *Held*, that those nephews to whom other legacies were given would come in the same as the others.—*Bartlett v. Heoudlette*, S. J. C. Mass., May 5, 1888; 16 N. E. Rep. 740.

196. WILL—Construction.——A will which divides the real estate of a testator "after the payment of my just debts" and disposes of the personal property by special and general legacies, does not exempt the personal property from the payment of debt and funeral expenses.—*Appeal of Mann*, S. C. Penn., May 21, 1888; 14 Atl. Rep. 270.

197. WILL—Construction—Devisees. ——A will which gives an estate to D for life and at his death to his children, vests the title at the death of D in his children who were living at the death of the testator. — *Lombard v. Willis*, S. J. C. Mass., May 5, 1888; 16 N. E. Rep. 737.

198. WILL—Construction — Survivorship. —— Where by his will a testator gives the income of two estates to his sons A and B, for life, and to the survivor of them for life and upon their death without issue the estates to go to R. R died before A or B and upon the death of A, without issue, both estates vested in B. — *Fiske v. Eddy*, S. J. C. Mass., May 7, 1888; 16 N. E. Rep. 768.

199. WILL—Description of Devisees. —— A devise to "my nephews and neices living at my decease" does not include the wives and widows of the testator. — *Goddard v. Amony*, S. J. C. Mass., May 5, 1888; 16 N. E. Rep. 725.

200. WRIT—Process—Return. —— Where the sheriff's return does not show that the process was severed on all the defendants, the decree will be set aside, although it states that the process was duly served on all the defendants. — *Dickison v. Dickison*, S. C. Ill., May 9, 1888; 16 N. E. Rep. 861.

CORRESPONDENCE.

NERVE IN LAW.—If every lawyer should express his honest opinion on the one thing lacking in the profession he would answer, *nerve*. It will meet him at the office with his every ready client who wants a law suit, and may not have a case, or the defaulter who would skip out and defraud his creditors of their just claim, or of one about to let go his rights rather than contest them in court or office, in suits or settlements in the business of law, whether trials or counsel, *nerve* is the fine art needed. Within the year an able advocate has won a will contest reaching into millions, and just as he was about to pick the fruits of his long and earnest effort, he was set upon by a couple of blackmailers, and, had he been less nervy than he was, would have been forced to release a large share of his profits, when his nerve stood by him and he became victorious. In another city a transaction reaching nearly a quarter million was let go by the unnerving of counsel at a point when the contracts were almost completed, and many thousands of earnest money were deposited. What a test of nerve power was this? As if one seeing a fractious horse tied to a post and frightened by a band should notice the animal and let him run away, rather than hold him to the post till the band passed by. We have all seen these cases during the year; seen angry clients throwing away costs for spite, and others throwing away rights that a little more nerve and coolness would have saved. In this is a wise counsel of greatest value. To-day it is a cattle contract, to-morrow a stock company, next week a business block, later on a street railway project, or a farm to cut up into city lots, or an option in real estate, or criminal to defend, or a damage suit to settle, nerve is the mettle that a lawyer most should cultivate. As business men are supposed to grow in trade by experience and learn by practice, so age adds new wisdom to the oldest counsel. His books have left out the case that last come to him. Lifes, trades and dealings and conditions are changing. He needs new knowledge. If he halts the busy procession will file past his office door to another counsel as if they saw the signal written "behind the times." The competition is so intense in law to-day, the attorneys are so very memerous and their work so exacting, that the fittest and strongest alone succeed. To make a bargain about it and stand by it requires both nerve and courage. J. W. DONOVAN.

QUERIES AND ANSWERS.*

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERY NO. 8.

John Doe was indicted for burglary and grand larceny. The jury found him guilty as indicted. His counsel moved in arrest of judgment for want of expressed felonious intent in the indictment. Judge M, of Cheyenne, presiding, held the objection fatal, but further ruled that the indictment was good for statutory house-breaking, and he therefore sentenced the defendant accordingly. In brief, John Doe was found guilty by a jury of the felony of burglary and grand larceny; Judge M sentenced him for the misdemeanor of house-breaking. Is the sentence good? LEY.

RECENT PUBLICATIONS.

NEWSPAPER LIBEL. A Handbook for the Press. By Samuel Merrill, of the Boston Daily Globe, a Member of the Bar of Massachusetts and of New York. "The liberty of the press consists in printing without any previous license, subject to the consequences of law. The licentiousness of the press is Pandora's box, the source of every evil."—Lord Mansfield. Boston: Ticknor & Company, 211 Tremont Street. 1888.

This work, although written by a member of the profession, is designed less for the use of lawyers than for that of the writers for the newspaper press and the publishers and editors of newspapers. It is a *vade mecum* for the newspaper man, designed to keep him out of trouble, or, as the author in his preface rather disrespectfully terms "the meshes of the law," by showing him what is safe to say, what is hazardous, what is extrahazardous, and what is undoubtedly deadly. We think this publication is both timely and useful. No doubt many libel suits grow out of the fact that editors, misled by glittering generalities about the liberty of the press and inflated ideas of the importance of the "fourth estate," unconsciously, or in the heat of controversy, transcend the liberal limits which the law accords to a free press, and thus come to grief. We think the book would be a very valuable acquisition to every newspaper editor, contributor and reporter, and in a minor degree useful to all legal practitioners.

NEBRASA CITATIONS. An Alphabetical List of all Cases cited in the Opinion of the Supreme Court of Nebraska, Reported in the First Twenty Volumes, showing those cited with Approval, Criticised, Distinguished, Doubted or Disapproved. With an Appendix Containing an Alphabetical List of Text Books Cited with Approval. By G. R. Chaney, Author of Kansas Index-Digest, Nebraska Digest, Hastings, Neb.; Gazette-Journal Company, Law Publishers, 1888.

This work will no doubt prove to be very valuable to the legal profession in Nebraska and other practitioners who may be interested in legal proceedings in that State. Indeed the work would be useful to practitioners in other States who may have occasion to cite as authority Nebraska rulings, as the character of the cases they may cite and their value as authority are indicated in the volume before us. The book is very carefully prepared, and is well worthy of a favorable reception by the profession.

JETSAM AND FLOTSAM.

A MISSOURI constable rode out to a farm near St. Joe armed with a subpœna for a woman who was wanted as a witness in a case in court. He found her in a back yard busily engaged in stirring a boiling, bubbling mass, in a large black kettle. He stated his business, and she said:

"I can't go to-day."

"But you must."

"What's the hurry?"

"Why, court's in session and the case is now on trial. They want you by noon."

"Well, I ain't going. You think I'm going off and leave this hull kittle o' saft soap to spile, just to please your old court? No sirree!"

"Why, my dear madam, you must. You really don't seem to understand——"

"I understand that I've got a big kettle o' splendid soap grease on to bile, and it'll make thin, sticky soap if it ain't finished to-day. You go back and tell the jedge so."

"You'll be fined for——"

"Pooh! I'd like to see the Missoury jury that'd fine a woman for not leavin' her soap bilin' when it was at a critical p'nt, as one might say. Tell the jedge I'll come to-morrow, if we don't butcher our pigs then; an' if we do, I'll come some day next week."

"But I tell you that won't do. You must come now."

"Lookee, young man, you think I'am a fool? I reckon you never made any soap, did you? If you had you'd know that——"

"What does the jedge care about your soap?"

"Well, what do I care 'bout the jedge, if it comes to that? Law's law and soap's soap. Let the jedge 'tend to his law an' I'll tend to my soap. The good book says there's a time fer everything, an' this is my time fer a bar'l o' saft soap."

"Well, madam, if you want to be fined for contempt of court, all right. You will be fined sure as——"

"Bah! I know all 'bout the law, an' there ain't anything in it, nor in the constitution of the United States, nor in the declaration of injeependence, nor in nothin' else, that says a woman's got to leave a kittle o' half-cooked soap and go off to a court when she ain't a mind to. I guess I know a little law myself."

"You say," remarked the magistrate, with judicial sternness, "that you were dazzled by the moonlight on the snow, and that you staggered from that cause, and not from intoxication. But there was no moon last night."

"Yesh, there wash," firmly rejoined the prisoner, who had not yet dried out; I shaw 'em. Two'v'm."

A MAINE sheriff, who was rather undersized, was given a writ of arrest against an Aroostook farmer. Having found the owner of the farm in the field he explained his business, and he was requested to read his writ, which commenced as usual: "You are hereby commanded, without delay, to take the body of," etc.

"All right," says the prisoner, stretching himself back on the grass, "I'm ready."

"Oh, but you don't expect me to carry you?"

"Certainly; you must take my body, you know!"

"Will you wait until I bring a team?"

"Can't promise. I may recover from my fatigue by that time."

"Well, what must I do?"

"You must do your duty." And there he lay immovable until the sheriff left, when he left also. Did he resist arrest?

"Why did you strike the plantiff?" was asked of a prisoner in the police court the other day.

"Because he said I was no gentleman."

"Well, are you a gentleman?"

"I don't suppose I am, sir; but it made me mad to be told of it, all the same."

THE medical witness, in giving his evidence in the case, informed the court that on examining the prosecutor he found him suffering from a severe contusion of the integuments, under the left orbit, with great extravasation of blood, and ecchymosis in the surrounding cellular tissue, which was in a tumefied state. There was also considerable abrasion of the cuticle. This magniloquent description for a time bewildered the court, until it was resolved by the judge himself into the simple words, "a black eye."